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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1560

UNITED STATES OF AMERICA,
Petitioner,

v.

AMADO MARTINEZ-FUERTE, *et. al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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ERRATA

The following errata have been discovered in the brief for respondents with this Court on 14 January 1976:

Page 3 Lines 27-30 – should read: "The appendices referred to include affidavits by Border Patrolmen, *an* Assistant United States Attorney, and statistical tables concerning the results of alleged *checkpoint* stop and interrogation practice."

Page 8 Footnote 5 – should read as follows: "Petitioner *has* filed copies of its briefs . . . ."

Page 20 Lines 1-3 – should read as follows: "The officers did not have reason to believe that respondents had crossed the border, been in contact with anyone that has, or *had* aliens in their vehicles."

Page 33 Footnote 14 – should read as follows: "The new United States Attorney for the Southern District of California recently announced a new enforcement program to prosecute employers of illegal aliens who withhold income tax and social security contributions from their alien employees' pay *and do not remit these sums to the government. Los Angeles Times*, November 6, 1975, p. K1"

Page 51 Footnote 31, Lines 5-9 – should read as follows: "The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. [citations omitted]. *The second* distinct objective is that those searches deemed necessary should be as limited as possible."

Page 55 Lines 4-7 – should read as follows: "While Paxton's Writ was directed exclusively toward the discovery of undutied goods *in* the Port of Boston, the warrant of inspection seeks to discovery all violations of Title 8 of the United States Code (A-52)."

Page 55 Footnote 34, Lines 7-12 – should read as follows: "If general search warrants based on less than probable cause are to become the basis for official searches in such a *wide* area, it would not be too bold to suggest that we have come a little way from *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1063 (1765) (overturning a 'ridiculous warrant against the whole English nation')."

Page 65 Lines 3-9 – should read as follows: "Since all of the aliens located in a vehicle driven by an accused smuggler must be incarcerated to provide the defendant an opportunity to examine them for possible exculpatory evidence, this unique complaint procedure allows *an* accused to plead guilty to a misdemeanor and

for the prompt release of the alien witnesses to Mexico."

Respectfully submitted,

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether this Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), which held that traditional notions of reasonable suspicion applied to roving immigration stops of automobiles for the purpose of interrogating the occupants as to their right to be in the United States, applies to causeless, discretionary Border Patrol stops of automobiles at the fixed checkpoint at San Clemente, California.

2. Whether the "warrant of inspection" issued by a United States Magistrate, if necessary to allow checkpoint stops and interrogations at fixed checkpoints, is constitutional to permit a permanent roadblock on a busy interstate highway sixty-six miles from the border where approximately one out of a thousand cars passing has persons without proper immigration documentation.

STATEMENT OF THE CASE

With the petitioner's statement of facts as it relates to the trials in the three cases before the Court, respondents have no quarrel (Brief for Pet. 2-10). However, with respect to petitioner's assertion that the record and opinion in *United States v. Baca, et al.*, 368 F.Supp. 398 (S.D. Cal. 1973) [hereinafter cited as *Baca*] is part of the record in these cases, respondents disagree. As reflected in the record below, counsel for respondent Martinez-Fuerte objected to the use of any materials being placed in the record which were extraneous to the materials before the trial court or the magistrate who issued the "inspection warrant:"

> Mr. Sevilla: I think that the warrant itself, and the affidavits, which were before the Magistrate when he issued the inspection warrant should be filed with the Court. I would object to any material that is extraneous to what materials the Magistrate had before him when he issued this inspection warrant, because the warrant is going to rise or fall based upon the materials that were before the Magistrate at the time he issued it; and, so, that would probably take into account any responsive affidavits or returns, and I would object to those being entered.

> The Court: Your objection is noted. They will be filed for whatever –
> Mr. Sevilla: Also, then –
> The Court: – purpose they may serve. (A. 26-27)

None of the respondents' cases were consolidated with the *Baca* case for the consolidated hearing. Nor did the magistrate who issued the "inspection warrant" rely on the entire *Baca* record. The latter merely read one agent's testimony in that case which had been incorporated by reference by an affiant to the warrant (A. 52). The issue of what is of record and what may be properly cited as such is one of such magnitude as to warrant expanded discussion prior to argument of the merits of this case.

In its petition to this Court, petitioner included as appendices (pages 48a-63a) applications for an "inspection warrant" *after* the decision by the Ninth Circuit in this case. The denials of the applications by District Judge Turrentine and Senior Circuit Judge Carter are also appended. These materials were not of record in these cases, and we moved to strike them from the Solicitor's petition, which motion was denied by this Court on 6 October 1975. These materials are now relied upon by petitioner to support arguments about subsequent San Clemente checkpoint activity (Brief for Pet. 21). The appendices referred to include affidavits by Border Patrolmen, as Assistant United States Attorney, and statistical tables concerning the results of alleged checkpoints stop and interrogation practice. None of this material was ever presented to the district courts involved in respondents' cases, nor to the circuit court which decided respondents' cases. The Clerk of the Court of the Ninth Circuit has not certified these

documents as part of the respondents' record pursuant to Rule 21 of the Rules of this Court. Counsel for the respondents read these *ex parte* affidavits and statistical charts for the first time in the Solicitor General's petition for *certiorari*. The documents are entirely the product of the *ex parte* activity of the United States Attorney's Office in San Diego and local Border Patrol Agents. They were never produced as part of an adversary hearing, much less a part of respondents' cases.[1]

Respondents' objections to the *ex parte* materials in the Solicitor General's brief rest not only upon the

[1] In *McClellan v. Carland*, 217 U.S. 268, 282-283 (1901), this Court refused to consider affidavits supplied by a district court judge with respect to proceedings the judge believed relevant for a decision properly to be made by this Court. This Court refused to consider these materials "because they are not in the record, as the same has been certified to us from the Circuit Court of Appeals as the one upon which it acted, . . ." In *Lawn v. United States*, 355 U.S. 339, 354 (1957), the Government attempted to file a transcript with this Court of a hearing accorded to Lawn in order to verify a point disputed in that litigation. This Court responded as follows: "Lawn has moved to strike that transcript and the portions of the Government's brief relating thereto. That motion must be sustained as we must look only to the certified record in deciding questions presented. *McClellan v. Carland*, 217 U.S. 268." *See also Ciucci v. Illinois*, 356 U.S. 571, 573 (1957) where this Court stated: "[T]his material, not being part of the record, and not having been considered by the state courts, may not be considered here." It is well established that in order to establish facts, a reviewing court will not consider or refer to affidavits and assertions *dehors* the record. A reviewing court is not a fact-finding court and must necessarily render its decisions on the evidence and record before it. It cannot receive new evidence. We have moved, by separate motion, to strike such references from the petitioner's brief.

procedural unfairness of one party attempting to buttress its position through *ex parte* affidavits and statistics, but also because the Border Patrol has refused[2] the efforts of present counsel to verify the manner in which these statistical compilations were taken at the San Clemente checkpoint.

The product of the procedural unfairness and contravention of the rules of this Court is exacerbated where the *ex parte* affidavits and statistics are completely within the control of one party, the petitioner, to the litigation. This is especially true in light of the tendency of law enforcement agents to report to the courts that which is necessary to achieve

[2] Attached to our motion to strike these portions of the petitioner's petition, we detailed the efforts made by the office of counsel for the respondents during the operation of the checkpoint to send investigative personnel to the San Clemente checkpoint to simply watch its operation. Permission was refused by the Border Patrol (see letter to John J. Cleary, Executive Director of Federal Defenders of San Diego, Inc. from Richard E. Batchelor, Deputy Chief Patrol Agent assigned to the Chula Vista sector of the United States Border Patrol, attached as Exhibit A to the motion to strike). An effort was made in a later case involving a warrant of inspection to gain a district court order allowing Federal Defender investigators to watch the activity at the San Clemente checkpoint. The district court denied the motion and a writ of mandamus to the circuit court of appeals was denied shortly after the decision in *United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975). See *United States v. Edward Windsor Wise*, Order Denying Mandamus Petition, No. 75-1159 (9th Cir. March 12, 1975).

law enforcement ends.[3] Respondents are unaware of any regulation which exempts the Solicitor General from the rules of appellate procedure binding upon other counsel.

In addition to such citations to authority outside the record, the petitioner repeatedly refers to unidentified hearsay informants in the Immigration and Naturalization Service (hereinafter cited as INS) who "inform" the petitioner, for example, that the price charged aliens to be smuggled has declined recently (Brief for

[3] Judge Hufstedler of the Ninth Circuit has noted the "curious and even suspicious" change of Border Patrol testimony after *Almeida-Sanchez* concerning the propensity of motorists to "consent" to the search of their trunks:

> Is it not curious and even suspicious that since the Supreme Court's decision in *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, so many motorists stopped by officers near the border voluntarily relinquish their trunk keys or open their trunks at the mere suggestion of the officer? The amount of cooperation is remarkable since the cases that reach this court involve motorists who had good reason to keep their trunk locked. *United States v. Hernandez-Martinez*, Slip 3, no. 3, No. 74-3327 (9th Cir. Sept. 30, 1975) (Hufstedler dissenting).

Pet. 25),[4] or that the time for a stop and questioning at a checkpoint ordinarily takes no more than five seconds per occupant (*Id.* at 28-29). (Cf. Brief for Pet. 53: "the average time consumed by a stop for questioning at San Clemente is still only three to five minutes"). These allegations are not only outside this, or any, record but the alleged source of the information within the INS is unidentified.

A product of petitioner's briefing beyond the record (and relying upon an interested party to this litigation to supply a "record" when needed), was made plain in this Court's opinions in *Brignoni-Ponce* and *Ortiz*, *supra*. The government stated to the Court in its briefs that checkpoints were necessarily placed in excess of twenty-five miles of the border because of "the *widespread* fraudulent use of border-crossing cards

[4] We note that while the person within the INS informs petitioner that the price an alien pays to be smuggled into this nation has allegedly dropped because of the absence of inland checkpoints, INS Commissioner Chapman states in a recent article:

> This influx of illegal aliens appears to be part of a greater migration of persons from the less developed nations of the world to the industrialized countries in search of employment. Waiting periods to legally enter the United States have been extended to several years in some instances, and many persons forsake the long delay and enter by any available means. The desire to enter and remain in the United States is so strong that no risk is too great nor seemingly any price too high to achieve that end. Many aliens pay large sums to smugglers to bring them in. Fees of $200 to $700 are commonplace, and sometimes illegal aliens pay as high as $1,500. Chapman, "A Look at Illegal Immigration Causes and Impact on the United States," 13 *San Diego L. Rev.* 34 (Dec. 1975) [hereinafter cited as Chapman].

[which] make it necessary to place most checkpoints at least twenty-five miles from the border." (Brief for Pet. 8, *United States v. Ortiz*, No. 73-2050) (Emphasis added).[5]

In our respondents' brief in *Ortiz* at 41, we pointed out the inaccuracy of this position quoting INS sources and statistics which confirmed that less than 5% of the arrests at checkpoints were of aliens violating the terms of their documents (*Id.* at 42).

In the present case, petitioner now concedes that, "Only a relatively *small proportion of the deportable aliens* apprehended by the Border Patrol enters this country lawfully and then violate the terms of their entry." (Brief for Pet. 27-28; but cf. 55-56) (Emphasis added).

The Court relied upon the government's original erroneous representation that the border crossing card violators were the major reason for the traffic checking programs far from the border. See *Brignoni-Ponce, supra*, slip opinion at 6. Now the government represents that 96% of the deportable aliens apprehended in fiscal year 1975 entered surreptitiously, i.e., illegally, and that the I-186 card violators arrested as deportable aliens compose only a portion of the 4% balance of apprehensions (Brief for Pet. 28).

The point of this discussion is that if this Court does not hold the petitioner to facts of record, and instead relies upon self-serving comments from petitioner and

[5] Petitioner had filed copies of its briefs in *Ortiz* (No. 73-2050) and *Brignoni-Ponce* (No. 74-114) with respondents in this case and relies on them to describe the problems facing law enforcement near the border. (Brief for Pet. 18). We ask the Court to refer to our respondents' briefs in those cases.

the INS such as "the Border Patrol has informed us" (e.g., Brief for Pet. 58, n.23), the result not only is procedural unfairness to respondents, but also factually erroneous results. One receives the impression when reading the government's brief in this case that its position shifts on identical points depending upon the assumed law enforcement need of the argument. As the above example shows, when the government argues the need for a checkpoint some 66 miles from the border, the alleged border crossing card problem is raised as the *raison d'etre* for the distance from the border (Brief for Pet. 55). But when petitioner is debunking one of the numerous alternative suggestions of the court below that the number of immigration cards issued by INS be curtailed, it explains that such card holders are not the problem. (*Id.* at 28).

SUMMARY OF ARGUMENT

I.

A. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), this Court held that Border Patrol officers on roving patrol might stop vehicles to inquire about the occupants' citizenship only when the officers are aware of articulable facts warranting a reasonable suspicion that the vehicle may contain illegally immigrated aliens. No facts of constitutional significance exist to distinguish a roving stop for interrogation from one conducted by officers at a checkpoint. All of the considerations which led this Court to rule illegal groundless roving stops of cars by the Border Patrol exist to produce the same conclusion for stops at inland checkpoints which are not the functional equivalent of the border.

The instant cases involve the stop procedure at the San Clemente checkpoint which is located on Interstate 5 some sixty-six miles north of the Mexican-American border. Each year upwards of ten million motorists travel north on this highway which is between California's two largest cities, San Diego and Los Angeles. Their journey is interrupted by the fixed Border Patrol checkpoint located near San Clemente, California. As each motorist reaches the checkpoint, at least one armed Border Patrol officer is standing in the middle of the highway by stop signs halting all traffic. This officer visually inspects the occupants of the vehicle and makes a subjective determination, guided by no statutory or administrative regulation, to refer vehicles off the road for further interrogation. Once referred off the highway, the occupants of the vehicle are subjected to interrogation concerning their right to be in the United States by other armed, uniformed officers. If the officers so elect, the occupants of the car may be ordered to produce documents evidencing their right to be in the United States. At no time prior to any of this activity do the officers have a reasonable suspicion that the occupants of the vehicle may be violating immigration laws. Because the Border Patrol is looking for illegal Mexican alien entrants, the occupants of the vehicle are often referred off the highway because of their apparent Latin-American appearance. In Southern California, there are hundreds of thousands of citizens and lawful residents of Latin-American appearance. The court below found that Border Patrol statistics demonstrate that only approximately one-tenth of one per cent of the automobiles passing through this checkpoint contain deportable aliens. *United States v. Martinez-Fuerte*, 514 F.2d 308, 321

(9th Cir. 1975). For this and other reasons, the court below found the checkpoint "unreasonable under established constitutional standards." (*Id.* at 314).

Just as this Court found in *United States v. Ortiz*, 422 U.S. 891 (1975), that the unfettered discretion of officers at the checkpoint to search cars is an important determinant of the unreasonableness of the checkpoint's operation, the same degree of discretion exists in the instant case for officers to arbitrarily select cars for referral off the highway and interrogation. In *Brignoni-Ponce*, this Court was not convinced that the needs of law enforcement required this degree of interference with lawful traffic, especially in light of the fact that the characteristics of alien smuggling operations tend to generate articulable grounds for identifying violators. "Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even through the intrusion incident to a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis" (*Id.* at 883).

The same rationale must apply to random checkpoint stops. With skin color a key determinant for suspicion on the part of the officers at the checkpoint, a proper factual basis for checkpoint stop and interrogation procedure is mandatory to prevent disparate treatment of motorists based solely upon the color of a person's skin.

The requirement of reasonable suspicion for checkpoint stops is the "logical, and predictable, next step in the development of search and seizure doctrine under *Almeida-Sanchez v. United States*, 1973, 413 U.S. 26. . . ." *Martinez-Fuerte, supra*, at 314.

B. The petitioner argues that the checkpoint stop operation, conducted on a random basis, is needed to enforce immigration laws. This same government argument was heard by this Court in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce* with respect to the enforcement procedures involved in those cases. Need alone, of course, cannot sanction otherwise unconstitutional activity. However, the need for the authority to conduct arbitrary, causeless checkpoint stops appears quite dubious in light of the ineffectiveness of the checkpoint in accomplishing its mission of deterring illegal aliens from entering this country. Recognizing the failure of current enforcement techniques, Leonard F. Chapman, Jr., Commissioner of the Immigration and Naturalization Service, has recently written:

> The long term solution to this problem is complex. In the short run, there are two ways the United States can deal with illegal aliens. First, we could build a massive Immigration Service. Perhaps with an army of border patrolmen and several thousand more investigators working in the cities, we might keep out most of the illegals, and eventually sift through the millions of persons in this country to find all those who do not belong here. But that is obviously not only impractical; it is abhorrent to the American conscience. And no one in the Immigration Service advocates such tactics.
>
> I believe that leaves just one practical solution – turn off the magnet that attracts millions of persons to our country. That magnet is the opportunity to obtain employment. Passage of H.R. 8713, the Rodino Bill, would accomplish this by holding the employer liable for employing illegal aliens and subjecting him to penalties if he did so knowingly. *We have had laws on the federal books for many years that call for harsh penalties for illegally entering the United States. They have proved to be an ineffective deterrent to illegal entry*. With the numbers that INS apprehends, it is obviously impractical to prosecute all cases. Our laws call for and illegal aliens do receive due process, which can extend for weeks, months or even years. Most of those we apprehend agree to voluntarily return to their homeland, thereby avoiding prosecution or lengthy formal deportation proceedings. Many come back to this country within days or even hours. (Emphasis supplied) Chapman, "A Look at Illegal Immigration: Causes and Impact on the United States," 13 *San Diego L. Rev.* 34, 39 (December 1975).

Government arguments that checkpoints deter illegal alien entry are undermined by the simple fact that fear of conviction for illegal entry is no deterrent. The fact that many who are detected are not even prosecuted further debilitates such arguments. There exist numerous alternative tools to aid in this law enforcement area. They exist in addition to a constitutional stop procedure – one supported by a reasonable suspicion standard.

II.

A. The warrant of inspection issued by the magistrate in this case offends traditional notions of propriety in the issuance of valid warrants under the Fourth Amendment. Since the warrant is not based upon any allegation of the existence of specific facts which warrant the belief that a specific individual is or has committed a violation of the immigration laws, it suffers from the same major deficiency inherent in the infamous writs of assistance issued by representatives of

the British Crown to enforce the collection of taxes and customs duties, and which led to the inclusion of the Fourth Amendment to the United States Constitution in 1791.

Moreover, because of this lack of individualized reasonable suspicion to believe that a particular vehicle contains immigration law violators, it is the officer at the checkpoint, not the issuing magistrate, who determines whether the intrusion is warranted for a particular vehicle. Thus, the warrant fails to provide the second additional safeguard enumerated by this Court by failing to interpose the mediating judgment of the magistrate between the members of the general public who are subject to the inspection and the officers at the checkpoint who conduct it.

B. The petitioner's proposed analogy to administrative inspection cases is inapplicable and does not justify the emasculation, through the use of a general warrant, of the reasonable suspicion standard for vehicular stops announced in *Brignoni-Ponce*. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court upheld inspection warrants based upon less than probable cause to believe that a particular building was the site of building code violations only because of the peculiar circumstances involved in conducting such administrative inspections. The Court cited a long history of judicial and public acceptance of this type of inspection, the need to inspect in light of the lack of alternatives available, and the limited intrusiveness of the intrusion upon individual privacy owing to its non-personal nature and its administrative, as opposed to criminal, focus.

In the case of area-wide immigration inspection warrants, however, these inspections do not enjoy the

long unbroken history of judicial approval extended to inspections for building code violations. There are many alternatives to causeless vehicular inspections available to the government to stem the tide of illegal immigration. Among these are intensification of the border line watch, restriction of the resident commuter and temporary border pass programs, and the enactment of legislation proscribing the knowing employment of illegal aliens. These are but a few of the many alternative programs which have not yet been tested by the government. Finally, the nature of the checkpoint inspection program is highly personal and the incidence of criminal prosecution is substantial. While the government does not usually choose to prosecute the simple illegal alien entrant, the *Baca* hearings demonstrated that the government does seek to prosecute all drivers of vehicles found to contain aliens.

C. Even if it is assumed that the *Camara*-type analysis is appropriate in the field of area immigration inspections, the warrant now before the Court does not fulfill any of the requirements that Justice Powell enumerated in *Almeida-Sanchez* for the issuance of an area warrant. The government has failed to demonstrate that the frequency with which illegal aliens are transported past the San Clemente checkpoint is sufficiently high to justify its positioning at that point on Interstate 5. The government's own statistics obtained from the return on the warrant of inspection indicated that only 0.12% of the passing cars were found to contain "illegal aliens." While petitioner speculates that the figure is inaccurate because of the ineffectiveness of the apprehension technique at the checkpoint, it certainly cannot justify its burden of establishing the frequency of transportation of aliens in

the area in question by reference to nothing more than speculation. Further, the ineffectiveness of the checkpoint operation persuasively dictates that the Fourth Amendment should not be strained to accommodate it.

Moreover, the San Clemente checkpoint is situated sixty-six miles from the international border. Petitioner has not demonstrated that it would be impracticable to place the traffic checking operation in an area near the border. Instead, petitioner's argument reverts to the contention that it would be too inconvenient and too expensive to conduct this operation in such an area. These factors are clearly insufficient to warrant the erosion of the Fourth Amendment rights of the innocent members of the traveling public traversing the San Clemente checkpoint.

ARGUMENT

I.

AN IMMIGRATION STOP FOR ILLEGAL ALIENS, WHETHER CONDUCTED PURSUANT TO A ROVING, TEMPORARY, OR FIXED CHECK, MUST BE SUPPORTED BY REASONABLE SUSPICION AS DEFINED IN UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873 (1975).

The San Clemente checkpoint is a permanent roadblock of all traffic proceeding north between California's two largest cities, San Diego and Los Angeles, and is situated 66 miles north of the Mexican-American border. The Border Patrol operation of the checkpoint is totally unregulated in that officers at the checkpoint have complete and unfettered

discretion to stop and refer any vehicle off the highway for interrogation and vehicle inspection purposes. The checkpoint is manned by uniformed, fully-armed, Border Patrol law enforcement officers standing in the middle of the highway. As decelerating oncoming vehicles approach the officer's position, the latter visually determines whether or not to refer each car to the secondary position off the highway for interrogation and inspection of the viewable interior of the car. *Martinez-Fuerte, supra*, at 312-313.

Most traffic is first stopped on the highway at the San Clemente checkpoint for the initial visual examination by the point officer and, if traffic is light, questioning. If the officer believes the car should be further examined, based upon his own subjective evaluation, he may refer it off the highway for further investigation. In *United States v. Baca*, 368 F.Supp. 398, 415 (S.D.Cal. 1973), the district court judge found that at the San Clemente checkpoint "the average motorist" is stopped although it may be "nothing more than a fleeting stop" (*Id.* at 415). Petitioner asserts that although the district court in *Baca* found that the "average" motorist does come to a stop in the middle of the highway, that "the Border Patrol has informed us that, . . . very few come to a full stop . . ." (Brief for Pet. 58, n. 23). Except by resorting to similar self-serving citations to matters not of record, respondents cannot challenge this new allegation. Suffice it to say that the statement in *Baca* concerning the "average" motorist and the picture of the San Clemente checkpoint belie the assertion of the petitioner.[6]

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[6] This picture was originally submitted in *Baca* and may be found in the government reply brief in *Ortiz*, at 1a; it accurately reflects what confronts the motorists approaching the San Clemente checkpoint. It strains credulity to think that motorists would not stop at stop signs flanked by armed Border Patrol personnel standing in the middle of the highway.

In *Almeida-Sanchez*, the only asserted justification for the Border Patrol's alleged right to causelessly stop and search every car within 100 miles of the border area was § 287(a) of the Immigration and Nationality Act, 8 U.S.C. §1357(a) and its accompanying regulation, 8 C.F.R. §287.1. This Court held that such an extravagant license to stop and search was not granted by the statute and regulation. The license sought to justify the current stop and inspection procedure at the San Clemente checkpoint is even more extravagant than that requested and rejected in *Almeida-Sanchez*. While roving patrols involved a single officer stopping a single vehicle in isolated, rural areas near the border, the government seeks a *carte blanche* to stop and inspect all traffic between two of the largest cities in the United States at a point 66 miles north of the international border.

For the reasons expressed below, this application to deconstitutionalize inland highway arteries well within the borders of the United States must again be firmly rejected.

A. There are no facts of constitutional significance which distinguish causeless automobile stops and passenger interrogations conducted as a result of roving, temporary, or fixed Border Patrol checks.

The only difference between the stop and interrogation in this case and that which was the subject of review in *United States v. Brignoni-Ponce, supra*, is that here respondent's stop occurred *at* the fixed checkpoint rather than by the roving Border Patrol car which emanated *from* the same checkpoint in *Brignoni-Ponce*.

Unlike Brignoni-Ponce who was "redlighted" to the side of the road by a Border Patrolman in a marked vehicle 66 miles from the border because he and his passengers appeared to be of Mexican descent, the respondent was initially stopped twice – first by uniformed, armed Border Patrolmen standing in the middle of Interstate 5, and then by the interrogating officer at secondary for no stated reason. The difference in the intrusion to the victim, of course, is virtually nonexistent. This Court has never held a stop and interrogation at a roadblock to be less intrusive than a stop and interrogation resulting from a roving patrol vehicle.

Although the intrusion to the victim is the same at roving, temporary, and permanent checkpoints, the latter two operations do differ from the roving procedure in that millions more of the traveling public are forced to place their liberties in the hands of the officers at checkpoints. Roving patrol operations located in remote areas close to the border involve less Border Patrol-citizen contacts while the San Clemente checkpoint operation alone involves a massive, permanent roadblock of thousands of vehicles each day well away from the border. The yearly traffic stopped at this roadblock is in excess of ten million vehicles per year. *Ortiz, supra*, at 893.

For constitutional purposes, this examination of the similarities in respondents' stops and interrogations and that of Brignoni-Ponce is decisive. In both cases, the Border Patrol agents had no probable cause before the stop or subsequent interrogation, nor was there the "reasonable suspicion" found sufficient for a street detention and weapon search in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972).

The officers did not have reason to believe that respondents had crossed the border, been in contact with anyone that had, or has aliens in their vehicles. Just as in *Almeida-Sanchez*, *Brignoni-Ponce* and *Ortiz*, the stops and interrogations "in the present case [were] conducted in the unfettered discretion of the members of the Border Patrol, who did not have . . . probable cause, or consent." *Almeida-Sanchez*, *supra* at 271. This permanent roadblock offers the Border Patrol just the "field day" in stopping automobiles which it was declared not to have in *Almeida-Sanchez*, *supra* at 269. The government can point to no regulations of any judicial or administrative authority which circumscribe the discretion of the Border Patrolmen at the checkpoint in determining whom they shall subject to the more intrusive interrogation at secondary after the initial primary stop (B.Tr. 65, 201-202, 208, 380-381).[7] Moreover, because over a thousand cars per hour are stopped at primary for the initial inspection, the permanent roadblock at San Clemente offers more opportunities for the exercise of the Border Patrolman's limitless discretion and embarrassment to the victim referred off the highway than occurs in roving stops by individual officers in rural areas near the border.

Petitioner again argues that the safety features at permanent checkpoints involving lighting and warning signs somehow make the subsequent intrusion on the travelling public less traumatic, thus magically metamorphosizing unconstitutional activity into legal action. Respondents again submit that safety and civility are norms expected of governmental officers in conducting stops, interrogations, and inspections of vehicles. No

[7] B. Tr. refers to the transcript in the *Baca* hearings.

court has ever held that causeless stops and interrogations by law enforcement officers attain legal status solely because they are conducted in a safe manner. A modest but non-life threatening violation of the Fourth Amendment remains unconstitutional activity.

Regularity of enforcement was a key consideration to this Court in *Ortiz* and *Brignoni-Ponce*. In *Ortiz*, the Court was "not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search" (at 895). The two-stop procedure in the case at bar demonstrates that, as in *Ortiz*, "checkpoint officers exercise a substantial degree of discretion in deciding which cars to search [or stop]" . . . for no officer ever would have to justify his decision to search [or stop] a particular car" (*Id.* at 896).

The point officer at the San Clemente checkpoint selectively picks cars for diversion off I-5 for the car inspection and occupant interrogation. Because the average hourly traffic amounts to some 1200 cars, the officer has only a second or two[8] to glance at each vehicle and make the decision whether to allow the vehicle to pass or to divert it off the highway. When a car is diverted off the road for the more intrusive inspection and interrogation, approximately twenty vehicles per minute, subjected only to the "fleeting" stop at primary, will pass the diverted motorist. Since the average time for a secondary stop is alleged to be three to five minutes (Brief for Pet. 53), 60 to 100 cars

[8] In this respect, a roving stop is more practical since officers may follow a suspect car for miles to determine whether or not factors exist for a stop and interrogation based upon reasonable suspicion to believe an immigration violation is taking place.

will pass the victim motorist subjected to the more detailed inspection and interrogation. These detained motorists "may not be reassured by seeing that the Border Patrol ... [stops] other cars as well for "[w]here only a few are singled out ... at San Clemente, motorists may find the [referral off the highway and interrogation] ... especially offensive." *Ortiz, supra*, at 895.

The government concedes that Border Patrol officers, in selecting cars for inspection at the checkpoint, do rely on "the complexion and physiognomy of the occupants of a vehicle. They are, after all, looking almost exclusively for illegal Mexican entrants, and it would affront common sense to expect that facial appearance or skin color would play no part in arousing their suspicions" (Reply Brief for Pet. 12, *United States v. Ortiz*, No. 73-2050). Because the point officer at a checkpoint has but a second or two to make the decision to allow a car to pass or refer it off the road for further inspection, the factor of skin color will play a key role. In contrast, an officer on roving patrol has more time to consider a multitude of other factors that make his decision to stop the car reasonable and less likely to be based solely on a skin color test.

The similarities of causeless roving and checkpoint stops for interrogation purposes extend to other areas. Just as a traveler on a road has no notice of the likelihood of a roving stop, travelers on highways well within our national borders do not anticipate such activity at inland checkpoints (B.Tr. 281). Flashing red lights and armed officers initiate both types of stops. One or two officers conduct the interrogations.

In evaluating the roving type stop in *Brignoni-Ponce*, this Court stated:

> [W]e hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.
>
> * * *
>
> In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only former limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in §287(a)(3) to mean within 100 air miles from the border. 8 C.F.R. §287.1(a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a

busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic .... [T]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not "reasonable" under the Fourth Amendment to make such stops on a random basis. (At 881-883).

The above considerations apply equally to the circumstances here involving a roadblock stopping all northbound traffic where a select minority of motorists are subjected to the more intrusive referral off the highway for further inspection and interrogation at secondary. It is respondents' position that there is little difference between the actions of the Border Patrol in this case and in *Ortiz;* thus, probable cause should be the requisite antecedent to the referral off the highway and interrogation/inspection procedure while reasonable suspicion should be required for the initial stop at primary. See *United States v. Barbera*, 514 F.2d 294, 298 (2d Cir. 1975) (seizure of alien on bus near border by Border Patrol held to be a search).

The requirement of reasonable suspicion for checkpoint stops is the "logical, and predictable, next step in the development of search and seizure doctrine under *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266...." *Martinez-Fuerte, supra*, at 314. Justice White,

concurring in this Court's judgments in *Ortiz* and *Brignoni-Ponce* agrees "that checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion" (at 915). The facts of the instant case demonstrate that the San Clemente roadblock, fixed in nature, operates without any nexus to the border. As the court below found, there is no evidence that cars passing the checkpoint emanate from the border and in fact approximately 99.9% of the vehicles passing the checkpoint were found to contain no immigration violators. *Martinez-Fuerte, supra*, at 322. Given these facts, the words of Circuit Judge Oakes are appropriate:

> The problem of illegal immigration is one of national concern. The adverse economic impact caused by illegal aliens is substantial and well documented. But to respond to this problem by watering down the probable cause requirements of the Fourth Amendment is most surely to take the lowest constitutional road. It would be dangerous precedent indeed for an economic problem, regardless of its magnitude, to provide the basis for the erosion of constitutional principles; much the more so when alternative solutions to the economic problem have been insufficiently explored by the other Branches of Government. *United States v. Barbera*, 514 F.2d 294, 301-302 (2d Cir. 1975).

B. In balancing the needs of law enforcement against the public's rights to travel within the borders of the nation, less intrusive alternatives as well as the effectiveness of the current checkpoint operation must be considered.

The operation of inland fixed checkpoints is but one of numerous Border Patrol operations for deterring aliens from illegally entering the United States. Inland checkpoints take away from the border area personnel needed to protect against illegal entry at the first opportunity – the border itself. Despite such manpower deployment, all checkpoints combined accounted for only 8% of the total deportable aliens apprehended in 1973,[9] and have proven to be ineffective in either deterring or apprehending aliens. The San Clemente checkpoint, for instance, apprehends only about 5%[10] of the illegal alien traffic going through it. In one twenty-day working period, seventy Immigration and Naturalization Service (INS) officers apprehended almost as many deportable aliens in Los Angeles than were apprehended in an entire year at the San Clemente checkpoint. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary*, House of Representatives, 93d Cong. 1st Sess., p. 4 (26 July 1973).

The INS has numerous alternative programs other than checkpoints to deter and apprehend deportable aliens; however, it is with Congress that the most meaningful deterrent may be found. Legislation to make the knowing employment of a deportable alien illegal is the

[9] See note 17 *infra*.

[10] See note 18 *infra*.

only effective way of deterring the entry of poor aliens who come to the United States in search of work. The problem, as Judge Oakes suggests above, is one for the other branches of government to solve. Justice White, concurring in *Ortiz* and *Brignoni-Ponce*, pointed to the ineffectiveness of traffic checking and the failure of the other branches to address the problem.

> The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts (*Id.* at 915).

We do not suggest that the alternatives posed below are a panacea which will eradicate the problems near the border. Rather, they will serve as a complement to a constitutional law enforcement technique of stopping vehicles based upon reasonable suspicion and searching for aliens on probable cause.

1. Inland fixed checkpoints are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States and other constitutional alternatives, as yet untried, exist.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court recognized that there was almost unanimous

agreement that the *only way* to enforce housing codes is by periodic inspections of all buildings within a geographic area. The Border Patrol is not limited to checkpoints miles within the United States as a means of deterring illegal alien entry and apprehending entrants. The primary defense against illegal alien entry should be at the border. Acting Immigration and Naturalization Service Commissioner Greene testified in *Baca* that the ideal place for stopping and deterring illegal alien entry is at the border (B.Tr. 53, 60). Checkpoints well within the United States are merely one of many secondary supports to the watch that takes place at the border (B.Tr. 72-73). There are at least nine other Border Patrol operations which are utilized to deter and apprehend illegal aliens (B.Tr. 111). These functions include, for example, inspections at or very near the border itself (B.Tr. 111), patrol car observation in areas somewhat removed from the immediate border areas (B.Tr. 112), farm and ranch checking (B.Tr. 112), public transportation inspection of buses, passenger trains, freight trains, and aircraft usually at transportation terminals (B.Tr. 113), metropolitan patrols (B.Tr. 113), industrial checking (B.Tr. 113), and a boat patrol and stowaway inspection program (B.Tr. 114). Other law enforcement agencies turn over a substantial number of deportable aliens to the Border Patrol (B.Tr. 114). In fact, the total number of illegal aliens apprehended by other agencies and turned over to the Border Patrol exceeds the total number of aliens captured by *all* checkpoint operations (B.Tr. 231).

In addition to these alternative operations to deter and apprehend illegal alien entrants, the Border Patrol also has the power to stop all vehicles and persons at

points which constitute the functional equivalent of the border. *Almeida-Sanchez, supra* at 273; *see also United States v. Byrd*, 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973) (a point seven miles north of the international border was deemed a plausible functional equivalent). Many other stops and searches away from the border may be conducted by the Border Patrol where there is "a reasonable certainty" that persons have just crossed the border illegally and entered a vehicle. *United States v. Markham*, 440 F.2d 1119 (9th Cir. 1971); *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970). Also, extended border searches are permissible anywhere in the United States if continuous surveillance of a vehicle from the border has been maintained by the Border Patrol. *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966). In addition, this Court has approved roving Border Patrol stops of vehicles in border areas where the agent has a reasonable suspicion to believe illegal immigration activity is afoot. *Brignoni-Ponce, supra.*[11]

[11]See also Ninth Circuit holdings allowing stops and interrogations based upon "founded suspicion." *United States v. Nunez-Villalobos*, 500 F.2d 1023 (9th Cir. 1974) (car seen twice traveling in opposite directions near border area notorious for smuggling at an unusual hour); *United States v. Ojeda-Rodriguez*, 502 F.2d 560 (9th Cir. 1974) (car appeared heavily loaded although only driver visible proceeding near border and car wandered from side to side of road); *United States v. Mora-Chavez*, 496 F.2d 1181 (9th Cir. 1974) (car stop near border after electronic sensor activity alerted agents to possible border intrusion); *United States v. Jaime-Barrios*, 494 F.2d 455 (9th Cir. 1974) (investigative stop approved based upon agent's knowledge of high smuggling in area, lack of recognition of the vehicle or driver); *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973) (Mexican-appearing driver of typical vehicle used in smuggling ventures which was riding low in rear in an area of high smuggling activity.

Also, the Border Patrol has continued to use "electronic intrusion alarm systems along the northern and southern borders." Dep't. of Justice, 1974 *Annual Report of the INS* 10 (1974). [hereinafter cited as 1974 *Annual Report*]. These devices detect movement of persons in border areas without the necessity of stationing personnel in the area. The General Accounting Office has noted the lack of interagency cooperation in resolving the illegal alien problem. While the INS reports that efforts to solicit the aid of the Department of Health, Education and Welfare, the Internal Revenue Service, and the Social Security Administration have begun, this is an area which if developed would not only detect aliens unlawfully within the United States, but would deny them welfare, unemployment, educational and other benefits. *See* 1973 *Hearings, supra*, at 115-119. Such a multiagency approach would provide considerable deterrent impact to illegal alien entry and is a potent alternative now available.

With the above considerations in mind, the Ninth Circuit Court of Appeals concluded that:

> "We are not persuaded that laws prohibiting illegal immigration will be rendered simply unenforceable should we deny to the government the power to stop and search automobiles, without probable cause or a warrant, at fixed checkpoints." *United States v. Bowen*, 500 F.2d 960, 965 (9th Cir. *en banc* 1974), *rev'd on other grounds*, 422 U.S. 916 (1975).

It is with Congress, as suggested above, that the primary deterrent to the entry of illegal aliens may be found. It is no secret that the vast majority of illegal aliens entering this nation come to find employment.

Legislation to make the knowing employment of illegal aliens a crime has languished in Congress for several sessions.[12] One Ninth Circuit jurist noted years ago that the "employment of . . . aliens is primarily responsible for the whole Mexican alien problem." *Herrera v. United States*, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring). Testimony in *Baca* by the then Acting Commissioner Greene indicated that passage of such legislation "would be one of the greatest deterrents oncoming" (B.Tr. 90).

The court below also noted that "the influx of aliens could conceivably be stemmed in various ways." *Martinez-Fuerte, supra* at 318-319. It bears repeating that this entire discussion of alternatives stems from the position of the government which "chooses to pitch its case upon an alleged unavoidable necessity if the laws are to be successfully enforced." (*Id.*)

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[12]H.R. 982, the "Rodino Bill," 93d Cong., 1st Sess. (1973) passed the House of Representatives on 3 May 1973 after clearing the House Judiciary Committee by a 30 to 2 vote. The Senate has never acted on it. Current criminal statutes not only do not discourage employers from hiring illegal aliens, but have the opposite effect. Title 8 U.S.C. § 1324(a)(3) makes it a felony to conceal, harbor, or shield illegal aliens. However, the last sentence of the section reads: "Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." James D. McKevitt, Assistant Attorney General for Legal Affairs, testified before the House Judiciary Committee that:

> "Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appears to be condoned by the existing provision in Section 247(a)(4) that employment shall not be deemed to constitute harboring of aliens." *Hearings Before Subcommittee Number 1 of Committee on the Judiciary*, House of Representatives, 93d Cong. 1st Sess. 7 (March 7, 1974).

The court below noted that increased manpower at the border itself is a sensible alternative. The Acting Commissioner of INS testified in *Baca* that most of those who enter without inspection are apprehended by Border Patrol officers on the line watch, from three to ten miles from the border, and praised their "track record" as rather good in this area. (B.Tr. 35, 238). However, the Deputy Chief Patrol Agent of the Chula Vista Sector admitted that there was room for improvement in the line area because of the "fence frequently [being] down" (B.Tr. 220), "large holes in the cyclone fence" (B.Tr. 221), "more sensor signals and more intruders than officers to handle" (B.Tr. 227), "frequently we would get alarms and by the time we got a unit there, a pickup has been made" (B.Tr. 264), and requests for "improvement and enlargement of the fence has been stricken in [Congressional] Committee for many years" (B.Tr. 243).

The testimony of Agent Batchelor that pickups of aliens are primarily made "down in the South Bay area, Imperial Beach, on into Chula Vista . . . on the Otay Mesa, . . . on Highway 94, . . . old Highway 80" and that the "bulk of smuggling pickups are made in . . . the first fifteen to twenty miles of the border itself" (B.Tr. 148), alone is sufficient to hold that the operation of the San Clemente checkpoint located some forty miles north of that area is not reasonably related to the border. The same witness, adamant in his position that checkpoints could not be located along the roads in the South Bay area (B.Tr. 162), acknowledged that no checkpoint has been established between the port of entry and the area south of National City and that there had never been a study as to the possibility of conducting traffic checkpoints along Interstate 5 in that area (B.Tr. 225).

In other words, the Border Patrol argument of necessity (Brief for Pet. 19) actually is one of convenience because alternatives currently available simply are not tried.[13] The number of constitutional alternatives to alleviate the illegal entrant problem is limited only by the industry, ingenuity and will of those responsible in government.[14] This nation has survived more serious problems and threats posed by illegal drugs and firearms, illicit alcohol, domestic subversion, and organized crime, without diluting constitutional principles. When inland checkpoints operated without constitutional restriction prior to 1973, they were ineffective as deterrents to illegal

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[13]This Court heard similar claims by the government in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce* concerning the checking procedure at issue in those cases. See also *Martinez-Fuerte*, *supra*, at 317:

> "The government argued in *Almeida* that roving patrol checks of automobiles were the only feasible means of apprehending 'illegal' aliens who crossed the border surreptitiously. *Almeida*, *supra*, 413 U.S. at 276 (Powell, J., concurring) . . . . We cannot ignore the irony in the government's present argument that the *only* effective way to apprehend aliens who have surreptitiously entered is to conduct fixed traffic checkpoints." (*Id.*, at n. 12)
>
> The government has cried "wolf" thrice too often.

[14]The new United States Attorney for the Southern District of California recently announced a new enforcement program to prosecute employers of illegal aliens who withhold income tax and social security contributions from their alien employees' pay. Los Angeles Times, November 6, 1975, p. K1.

entry. Today, *a fortiori*, they are of no deterrent value.[15]

2. Inland checkpoints not at the functional equivalent of the border are ineffective in deterring illegal alien entry into the United States.

The current estimate that up to twelve million aliens are illegally here (*Brignoni-Ponce, supra*, at 878) renders claims of the deterrent effect of checkpoints hollow (Brief for Pet. 19, 51).

Petitioner argues that inland checkpoints are "the single most important element of the enforcement plan, in terms both of apprehending illegal entrants and of deterring unauthorized entry" (Brief for Pet. 19). The government finds itself without a record to support these claims. First, other law enforcement agencies apprehend more illegal aliens than the total number caught by all checkpoint operations (B.Tr. 231). The Border Patrol makes most illegal entrant apprehensions at the "line watch" (border) and not at checkpoints (B.Tr. 29, 38). In terms of deterrence, the ease with which millions of aliens enter this country speaks for itself. For example, for the fare of $11.50 an alien may

[15]If the checkpoints are to be effective deterrents, says petitioner, they must pose a serious threat to smugglers of aliens (Brief for Pet. 21). With an estimated 20% of the population of Mexico now residing illegally in this nation, the credibility of checkpoints as deterrents to illegal entry is nonexistent. (The population of Mexico is 48,313,438. *IX Censo General de Poblacion* 1970. Mexico, D.F. Estimates of the number of Mexicans illegally residing here range to as many as ten million. See *U.S. News and World Report*, December 9, 1974, p. 77).

purchase a plane ticket from San Diego to Los Angeles and completely bypass the San Clemente roadblock as well as the two other strategically located traffic checkpoints (Temecula and Oak Grove) in the Chula Vista Sector of the Southern District of California (B.Tr. 248). Another means of successfully avoiding checkpoints is for the alien to get out of the smuggler's vehicle before reaching a checkpoint and simply walk around it (B.Tr. 279). Checkpoints can be easily evaded when they close during inclement weather, heavy traffic, or due to a lack of available manpower (B. Tr. 320-321).[16] Thus, at San Clemente, the checkpoint is closed about 30% of the time (B.Tr. 250).

All Border Patrol traffic checking operations during fiscal year 1973 accounted for only 8% of the total number of deportable aliens apprehended.[17] In

[16]Petitioner's arguments about checkpoint deterrence fall short of the mark when the captured alien entrant is merely returned to the Mexican border region to try his luck again at illegal entry. Most entrants are not prosecuted (Brief for Pet. 47) and are returned voluntarily to Mexico. In 1974, 182,351 aliens were apprehended who had been previously expelled. 1974 *Annual Report* 97 (1974). Moreover, most illegal alien entrants are not apprehended at all. As INS Commissioner Chapman stated in December of 1975, "it is painfully evident to our officers that they are capable of handling only a small percentage of the violations because of the limited funds and personnel. *Chapman, supra*, at 35.

[17]In fiscal year 1973, 655, 968 deportable aliens who had either surreptitiously entered (551, 328) or violated the terms of their permits (104,640) were apprehended. 1973 *Annual Report* 8-9 (1973). "In the United States, during fiscal year 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations." *United States v. Baca*, 368 F.Supp. 398, 407 (S.D. Cal. 1973). By dividing the number of apprehensions at traffic checking operations by the total number of aliens arrested, the 8% figure is achieved. Since much of fiscal year 1973 involved roving, temporary and fixed checking operations, the percentage of aliens captured at permanent roadblock operations is a lesser percentage.

measuring the effectiveness of the immigration roadblock at San Clemente, the ratio between those illegal aliens traveling through the checkpoint and those detected and arrested should be examined. Border Patrol records and affidavits in this case indicate that San Clemente captures only about 5% of the alien traffic traveling through it north on Interstate 5.[18]

Despite these statistics, the petitioner's argument of deterrence is characterized by such reasoning as "the more effective it [the checkpoint] is, the less productive it is likely to be" (Brief for Pet. 51). This type of argument, which is necessarily impossible to verify, might have merit if almost twenty per cent of the Mexican population[19] were not currently illegally residing in the United States. The very presence of these people completely refutes the arguments of checkpoint deterrence.

Although inland checkpoints are deemed a "secondary line of defense" (A. 45), manpower commitments to the border are nominal in comparison. The supervising Border Patrol agent for the El Centro Sector testified that during a typical day only ten officers were committed to cover the seventy to seventy-five miles of border in his sector (B.Tr. 357). The supervising agent for the Chula Vista Sector

[18]Government figures (A. 46-47) reflect that about 319,000 illegal aliens traverse Interstate 5 each year. Government affidavits reflect that less than 17,000 allegedly illegal aliens were apprehended in 1973 at San Clemente out of the estimated 319,000 who had traversed north through that route. Thus, about 5% of the illegal alien traffic going through the San Clemente roadblock is apprehended.

[19]See note 14, *supra*.

indicated that during a shift of a typical week day, approximately twenty Border Patrol officers would be committed to cover the seventy miles of border in his sector (B.Tr. 229). Both of the supervising agents complained that they have not been authorized enough personnel (B.Tr. 227, 400), but the fact remains that the significant number of personnel devoted to the operation of inland checkpoints[20] deprives needed manpower from the border area. In fact, the number of officers devoted to border duty is insufficient to even respond to electronic sensor alerts which indicate the possibility of aliens crossing the border (B.Tr. 227).

The "zone defense" articulated by the Border Patrol in *Baca* reveals a small commitment of officers to the vast stretches of the immediate border area despite pronouncements that the border is where the primary defense is to be made (B.Tr. 53). The "zone defense"

[20]In *Baca*, the Border Patrol Handbook was introduced as Government Exhibit 43. A permanent checkpoint like that at San Clemente requires a huge manpower commitment to operate 24 hours a day. A fixed checkpoint operation requires one or two officers to maintain a point position in the middle of the highway to refer traffic to secondary. A second officer working with an interrogator and stationed near a patrol vehicle mans the secondary position (*Id.* at 9-16). Officers manning the point position must be rotated frequently to avoid fatigue inherent in this type of operation (*Id.* at 17). Personnel must be available in case a vehicle runs through the checkpoint or turns around before arriving (*Id.* at 18). To guard against aliens walking around the checkpoint, frequent patrols on both sides of the checkpoint are required (*Id.* at 3). Agent Richard E. Batchelor testified that twenty officers are assigned to the immediate border area in the Chula Vista Sector on a typical week day work shift (B. Tr. 291), while a total of forty-seven are stationed at the San Clemente checkpoint (B. Tr. 229, 267).

concept (B.Tr. 162, 166) provides the government a bootstrapping argument – it is impossible to efficiently patrol the Mexican-American border, but because of reliance on inland checkpoints, it weakens its manpower commitment there. Thus, with the Border Patrol's commitment to the "first line of defense" so meager, it is understandable that deportable aliens are arrested at inland checkpoints and why millions of others escape detection. Only thirty officers are devoted to patrolling the entirety of the California-Mexican border on a typical day shift (B.Tr. 229, 357). At the same time, forty-seven officers are needed for the twenty-four hour operation of the San Clemente checkpoint which is but one of the nine checkpoints in California (B.Tr. 267). Until the government makes a major commitment to apprehending and deterring aliens in the border area, it cannot point to self-created manpower shortages there to justify the existence of inland checkpoints.[21]

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[21]The ineffective placement of Border Patrol officers was demonstrated briefly in 1969 during "Operation Intercept." At that time a significant manpower commitment was made to the border area with the immediate effect of acting as an effective deterrent to aliens from Mexico illegally entering the United States (B. Tr. 258, 435). This result was obtained simply by increasing the number of officers at the border by an increment of 57 (B. Tr. 437). The "zone defense" strategy is similar to that of the Japanese Imperial General Headquarters during World War II. In seeking a defense to the American invasions of Japanese occupied islands in the Pacific, innovative tactics were devised:

> "The new tactics were to prepare a main line of resistance and defensive positions well in the rear of the beaches, place substantial forces in reserve to mount counterattacks at opportune moments, and offer token defense only at the beach." S.E. Morison, *The Two-Ocean War*, 426 (Little Brown 1963).

C. There exists no constitutional or statutory authority for random, causeless checkpoint stops of cars and interrogations of occupants without a reasonable suspicion to believe an immigration law is being violated; the relevant need mandates an articulable factual basis of reasonable suspicion to uphold a checkpoint stop.

The government, in seeking a constitutional theory to justify causeless checkpoint stops and interrogations under 8 U.S.C. §1357, relies on the previously rejected argument of law enforcement "need" (Brief for Pet. 19, 51). *Brignoni-Ponce, supra,* at 877; *Almeida-Sanchez, supra,* at 273-275. Even if this Court accepted such a theory of "need equals probable cause/reasonable suspicion," which it has not, we have shown above that checkpoints are ineffective in their purpose and that numerous alternatives to illegal alien apprehension and deterrence exist and are now in effect. There is no reason to believe that the requirement of reasonable suspicion for a checkpoint stop would end the role of checkpoints as one of many tools in this area of law enforcement. During the post-*Martinez-Fuerte* era in the Ninth Circuit, the San Clemente checkpoint has still been used as the base for roving stops based upon reasonable suspicion.[22]

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[22]As petitioner concedes, "[s]ome vehicles are stopped at checkpoints on the basis of articulable factors suggesting a break in the pattern of normal traffic" (Brief for Pet. 22). This summer, the Border Patrol conducted a program of using roving patrols near the San Clemente checkpoint. Calls would be placed to the checkpoint to determine if cars under the suspicion of the roving patrolman had been stopped previously. Such records are kept on a "rolodex." If the officer received such information, he would stop the car. Thus, in *United States v. Antonio Martinez-Gonzalez*, Mag. No. 75-1806M (S.D. Cal. 16 July 1975), the government relied on this factor to justify the stop. Although

This Court has held that the empowering statute, 8 U.S.C. §1357, requires reasonable suspicion for roving stops. For constitutional purposes, there are no rational factual characteristics to distinguish checkpoint from roving stops. Although petitioner argues a checkpoint stop is no more intrusive than a stop at a traffic light (Brief for Pet. 31-32), unlike the stop at a traffic light, checkpoint procedure involves armed law enforcement agents inspecting cars and interrogating drivers and passengers for evidence of crime. This includes a stop of a vehicle traveling 55 miles per hour on a major freeway; a visual vehicle and occupant inspection by a point officer; an order to proceed off the highway; interrogation by at least one other officer; an inspection of what is in plain view inside the automobile; a possible demand for a show of immigration documents and perhaps a "request"[23] to search the trunk. All of

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the unrestricted checkpoint stop procedure of the past must remain a part of history, the San Clemente checkpoint will still serve a valid purpose such as a base of operation to receive calls for stops, and to conduct reasonable suspicion stops. As Justice Powell stated, "[t]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." *Brignoni-Ponce, supra,* at 883. See also *Baca, supra,* at 418 where the court noted that a checkpoint operated upon advance information gave the officers "perhaps probable cause to stop and question. . . ."

[23]Causeless trunk searches have taken place at San Clemente despite the Ninth Circuit ruling in *United States v. Bowen, supra,* that probable cause was a necessary antecedent. The government claims these took place as a result of probable cause or consent. As to the latter basis for search, see note 1 *supra.* In *United States v. Wise,* No. 75-3014 (9th Cir. argued January 9, 1976), testimony from the former law clerk to the district judge revealed that the clerk, directed off the highway at San Clemente, was ordered to open the trunk of his vehicle without

the above may take place if the motorist is one of the unlucky persons arbitrarily selected for "secondary" inspection by the point officer. The entire process takes three to five minutes (Brief for Pet. 53).

The need for an articulable, constitutionally recognized standard of reasonable suspicion to justify checkpoint stops is significant where the factor of race is part of the equation for law enforcement procedure. Immigration checkpoint stops, which allow agents unbridled discretion in selecting their targets for the more intrusive interrogation and visual vehicle inspection, provide multiple opportunities for abuse. This Court has held that the potential for abuse is a significant factor in evaluating privacy invasions. *Davis v. Mississippi,* 394 U.S. 721, 727 (1969). As Professor Greenberg has recently pointed out:

> "Harassment is not confined to inspections motivated solely by personal spite and bad faith, but includes overzealous enforcement. The latter problem is considerably more acute . . . [where] one of the main aims of the inspection scheme is to serve as a credible deterrent. Government use of the search power to deter, unchecked by neutral inquiry into the necessity for a given level of deterrence, creates the possibility of substantial abuse, since it is undeniable that the greater the governmental abuse, the greater the deterrent effect." Greenberg, "The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since *Camara* and *See*," 61 *Cal.L.Rev.* 962, 1023 (1973).

At the San Clemente checkpoint on Interstate 5, an entire traveling public of over ten million cars per year

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his consent and, of course, without probable cause (R.T. 37). This occurred while the checkpoint was operating pursuant to the inspection warrant.

is subjected to privacy invasions, although not all of the drivers and occupants are subjected to the same degree of intrusion. The unequal treatment at the checkpoint, not based on an articulated evidentiary foundation of reasonable suspicion of illegal conduct, leaves the decision of whom to subject to interrogation and referral off the highway completely within the discretion of the Border Patrolmen who may exercise that discretion for other than proper reasons.

The most obvious potential for abuse at permanent checkpoints such as at San Clemente is the invidious discrimination against the millions of individuals of apparent Latin American descent traveling on the highway.[24] Much of the traffic through the checkpoint involves recently immigrated Mexicans returning from visits to relatives in Mexico to their Los Angeles homes (B.Tr. 155). The Imperial Valley, located in the Southern District of California, is approximately 52% Mexican-American (B.Tr. 346). The Ninth Circuit has taken judicial notice "that there is a large Mexican-American population in the Oceanside area . . . [and] it is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." *United States v.*

[24]We pointed out in *Ortiz* (Brief for Resp. 46-47), the privacy-related interests violated by the San Clemente checkpoint; they include: a) freedom from arbitrary governmental interference; b) an individual's liberty of positioning, that is the right to decide to remain or go elsewhere; c) an individual has a liberty of movement, that is, free passage without interruption; d) an individual has a Fourth Amendment interest in avoiding those whom he does not wish to encounter; and e) the occupant of a moving automobile has a privacy interest to be free from a stop and visual inspection of the car interior by a Border Patrol officer at a checkpoint. See Note, "Automobile License Checks and the Fourth Amendment," 60 *Va.L.Rev.* 666 (1974).

Mallides, 473 F.2d 859, 860 (9th Cir. 1973).[25] Oceanside is just 18 miles to the south of the San Clemente checkpoint on Interstate 5. The major cities in Southern California contain huge populations of persons validly residing in the United States who happen to be of Latin American ancestry.[26] Indeed, Los Angeles, California, has "the largest Mexican population of any city on the continent, with the exception of Mexico City itself." *Fernandez v. United States*, 321 F.2d 283, 286 (9th Cir. 1963).

The focus at the San Clemente checkpoint is on illegal aliens from Mexico. With a substantial traveling public of lawfully admitted Latin American residents and citizens passing through the checkpoint, it is apparent that referrals to the secondary area for interrogation based upon skin color would constitute invidious discrimination and a denial of equal protection of the laws to a minority population. As this Court said in *Brignoni-Ponce, supra*, at 886-887:

> Even if they [the agents] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the

[25]See also *United States v. Camacho-Davalos*, 468 F.2d 1382, 1383 (9th Cir. 1972) (Border Patrol agent's description of occupants of a truck as Mexican appearing Spanish-speaking and without immigration documents "fits thousands of American citizens").

[26]See Appendix A to this brief which is a map of the communities to the south of San Clemente, California originally submitted in *Baca* as Government Exhibit 5.

> physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

Earlier in this brief, we pointed out that with the short amount of time available to view cars at a checkpoint, skin color would be a key criterion for referral to secondary. With deportable Mexican aliens the object of inspection, arbitrary stops and referrals to secondary may be "a major source of friction between the police and minority groups." *Terry v. Ohio*, 392 U.S. 1, 14n. 11 (1968), quoting the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* 183 (1967).[27] These sensitive considerations led the drafters of the *Model Code of Pre-Arraignment Procedure*[28] to require an evidentiary basis for automobile stops and searches. The reporters for the *Model Code* stress that:

[27]"The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." American Civil Liberties Union, *Police Power and Citizens' Rights* 11 (1967). See also, e.g., *National Advisory Commission on Civil Disorders, Report* 93 (1968).

[28]*Model Code of Pre-Arraignment Procedure Section* 110.2(2) (Official Draft No. 1, 1972). The *Model Code* would only suspend the reasonable suspicion requirement for stops at roadblocks during emergency situations.

> There are two different sorts of costs associated with the stop. First, there is the imposition upon innocent persons even when the police stay within the terms of the authority granted. Such imposition is an evil in itself, and may lead as well to the further evil of resentment against the police and civil authority in general. Second, there is the danger that the stop is susceptible to abuse. It may be used not for its authorized purpose but to harass persons to whom the police may be hostile or about whom they feel a generalized suspicion or apprehension—e.g. youths, unconventionally attired persons, negroes in white areas, whites in negro areas. And the stop and frisk carry the special potential that they may be used to circumvent constitutional restrictions on search and seizure by providing a pretext to search for narcotics and gambling slips. The danger of abuse is argued to be particularly serious, since the stop must be predicated on a more permissive standard than arrest thus making it more difficult to confine the authority to proper cases and to ascertain after the fact whether an abuse has indeed taken place.[29]

For all of the reasons stated in Section I of this brief, Border Patrol checkpoint officers must be required to have a reasonable suspicion prior to conducting a stop to inspect a car or interrogate the occupants.

D. No warrant is required for operation of checkpoints for the purpose of stopping traffic if the agents have a reasonable suspicion that each car stopped possesses immigration violators.

Our argument that reasonable suspicion is the only necessary constitutional predicate for stopping cars at

[29]*Id.* at § 110.2, Comment 4(b).

checkpoints makes unnecessary the requirement for a warrant. None is necessary for roving stops since the reasonable suspicion standard provides the necessary protection against arbitrary and harassing stops of motorists on the highway. A warrant could not add significantly to this protection.

A holding that reasonable suspicion is necessary for checkpoint stops will bring about a balance to this Court's recent decisions in this area. As the constitutional requirement of probable cause is the same for roving and checkpoint searches (*Almeida-Sanchez* and *Ortiz*) so should reasonable suspicion be the standard for roving and checkpoint stops (*Brignoni-Ponce* and *Martinez-Fuerte*).

Petitioner, however, wants neither the protection of reasonable suspicion nor a warrant to permit checkpoint stops (Brief for Pet. 34-42). Again, as in *Ortiz*, petitioner argues that the checkpoint stop procedure is "reasonable" and there the analysis ends. For the reasons stated in this section and by the court below, the reasonableness argument fails for want of supportive facts, a record, and recognized constitutional support. See *Martinez-Fuerte, supra*, at 322.

The requirement of reasonable suspicion satisfies the Fourth Amendment requirement of reasonableness for seizures which is the standard by which a decision to seize is tested. In the criminal context, reasonableness requires the showing that something connected with criminal conduct will probably be found in the place to be inspected or seized. With respect to Border Patrol checkpoints such as at San Clemente, the reasonableness requirement is not met. There is no demonstration that the cars seized probably contain aliens; in fact, the court below found only about one out of a thousand cars contains immigration violators. *Id.* at 321.

In adopting the standard of reasonable suspicion for roving stops in *Brignoni-Ponce*, this Court relied upon *Terry v. Ohio*, 392 U.S. 1 (1968) where Chief Justice Warren, speaking for the Court, stated:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of seizure or the search 'warrant a man of reasonable caution in the belief' that the action was appropriate? *Id.* at 21-22.

In each case, the particular intrusion must be justified by specific factual circumstances. The Court especially eschewed stops based upon hunches or unfair generalizations:

> Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches, a result this Court has consistently refused to sanction. *Id.*

1. Petitioner's assertion that causeless, warrantless checkpoint stops have inherent safeguards to protect the individual motorists is contradicted by the record and experience.

Petitioner asserts checkpoint activity is "ordinarily subject to no variation in terms of location

and . . . operating procedure, . . . " (Brief for Pet. 38). Thus, so the argument goes, the aggrieved person may litigate any alleged Fourth Amendment violations at a post-stop hearing. In *United States v. United States District Court*, 407 U.S. 297 (1972), this Court speaking through Justice Powell stated:

> The Fourth Amendment contemplates a *prior judicial judgment*, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will be preserved through a separation of powers and division of function among the different branches and levels of Government. . . . prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. *Id.* at 317-318 (Emphasis added).

The requirement of reasonable suspicion to support a stop is the "prior judicial judgment" insuring the reasonableness of the government activity at checkpoints. While we agree that a warrant procedure may be a difficult concept for the government to work under, it is the only alternative available in the absence of reasonable suspicion to believe each car stopped carries immigration violators. We consider the warrant aspect of this case in our next section; suffice it is to say that the government's petition for a *carte blanche* for checkpoint stops is the same request refused by this Court in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce*.

In its argument against the warrant requirement, petitioner asserts that the checkpoint machinery is too delicate a mechanism for the judiciary to tamper with—after all, "basic decisions regarding the location of a checkpoint . . . are made by relatively high-ranking officials of the Border Patrol . . ." (Brief for Pet. 33)

The mobile nature of "permanent" checkpoints was demonstrated in *Baca* where pictures of the "permanent" checkpoints such as Temecula and Oak Grove, California, were introduced.[30] These photos show that these "permanent" checkpoints are nothing more than points on a road at, or near, where a government vehicle may station itself to stop on-coming traffic. The only difference between this type of fixed checkpoint and a roving check is that the officer steps out of his car to stop all traffic while in a roving check the officer follows a suspect vehicle and red-lights the motorist to a stop. These differences are hardly sufficient to cause a difference in the constitutional requirements justifying the activity. There are no more safeguards for checkpoint stops than with roving stops. When conducted free of constitutional restraint such as a warrant or reasonable suspicion, they violate the rights of an entire traveling public.

2. The right to travel freely within the nation is undermined by arbitrary checkpoint activity which lacks a demonstrable nexus to the border.

Unrestricted inland checkpoint activity not only violates privacy rights protected by the Fourth Amendment, but also interferes with the separate right of the citizenry to travel freely within the boundaries of the nation. The right of free travel in the interior of

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[30]Temecula and Oak Grove photos were introduced as Government Exhibits 31c (B. Tr. 176, 430) and 38 (B. Tr. 181-183; 475-476; 483; 488) respectively. They reveal nothing more than roadways where Border Patrol cars park and place portable road signs out to alert on-coming traffic.

the United States is fundamental and has roots over 100 years old. In the *Passenger Cases*, 48 U.S. 282, 492 (1849), Chief Justice Taney stated:

> We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.

In *United States v. Guest*, 383 U.S. 745, 758 (1966), this Court held:

> Although the Articles of Confederation provided that 'the people of each state shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

This fundamental right of travel was also recognized in *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Edwards v. California*, 314 U.S. 160 (1940); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

A reasonable suspicion that illegal immigration activity is afoot is an adequate constitutional basis upon which to interrupt motorists' respective rights of privacy and free travel. Absent that safeguard, only a warrant could permit the intrusion such as exists at San Clemente. To that issue, we now turn.

II.

THE WARRANT OF INSPECTION IS AT VARIANCE WITH THE FOURTH AMENDMENT.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The warrant of inspection issued by the magistrate in this case, as the government apparently concedes, does not contain any of the limitations[31] traditionally believed to be necessary to protect the citizenry from the excesses of over-zealous officials. *Martinez-Fuerte*,

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[31] "The rationale is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. [Citations omitted] distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. See, e.g., *Boyd v. United States*, 116 U.S. 616, 624-630; *Marron v. United States*, 275 U.S. 192, 195-196; *Stanford v. Texas*, 379 U.S. 476. The warrant accomplishes this second objective by requiring a 'particular description' of the things to be seized." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

supra, at 315-316. In one of the first cases dealing with the interplay between the requirements of the Fourth Amendment and legislation enacted by Congress, *In re Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1878), the necessity for applying the specificity requirements contained in the Fourth Amendment in a literal manner was noted. The Court held that the inspection of first class mail was not subject to discretionary review and could only be accomplished after a warrant had been obtained upon oath or affirmation particularly describing the matter to be seized. Since the date of the *Jackson* decision, while this Court has at times employed a flexible balancing test in assessing the requirements of probable cause in the administrative inspection context, discussed, *infra*, it has never wavered from the principle that a neutral magistrate must interpose his judgment as to whether specific facts presented to him rise to the level of probable cause before a valid warrant authorizing the requested intrusion may issue. *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

As the opinion of the court below correctly notes, the instant warrant does not provide either level of protection normally associated with the issuance of a valid warrant. *Martinez-Fuerte*, *supra*, at 315-316. Since the warrant contains no specific facts relating to particular individuals or vehicles, it does not disclose individualized probable cause to search or even reasonable suspicion to stop and inquire as required by the decisions of this Court's last term in *Ortiz* and *Brignoni-Ponce*.

> Nor does the warrant interpose the mediating judgment of the magistrate because the warrant is a blanket authorization for Border Patrol agents to stop all cars and to detain for interrogation certain cars at *their* discretion. They, not the magistrate, make the decision. *Martinez-Fuerte*, *supra*, at 316 [emphasis in original].

The same deficiencies in the infamous writs of assistance issued by the judiciary of the British Crown to enforce the collection of taxes and customs duties sparked widespread civil discontent and led to the inclusion of the Fourth Amendment to the United States Constitution in 1791.[32] The most notable of these writs was that secured in 1761 by Charles Paxton, the elder of the Office of the Surveyor of all Rates, Duties, and Impositions, obtained from a local court in order to assist him in collecting taxes for the Crown.[33]

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[32]N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, 51-54 (1937); See also, Horace Gray, *Writs of Assistance*, contained in Appendix I to *Quincy's Massachusetts Reports* (1761-1772), hereinafter referred to as *Gray*.

[33]The document in its entirety reads as follows:

Province of the	)	George the Second by the Grace of
	)	God of Great Britain, France, and
	)	Ireland
Massachusetts Bay	)	King, Defender of the Faith, etc. –

To all and singular justices of the Peace, Sheriffs, and Constables, and to all other our offices and subjects within said Prov. & to each of you Greetings –

WHEREAS, the Commissioners of our Customs have by their Deputation dated the eighth day of Jany. 1752, assigned Charles Paxton, Esqr. Surveyor of all Rates, Duties and Impositions arising and growing due within the Port of Boston in said Province as by said deputation at large appears, WE THEREFORE command you and each you that you permit ye said C.P. and his Deputies and Servants from Time to time at his or their will as well in the day as in the Night to enter and go on board any Ship, Boat, or other Vessel riding, lying, or being within or coming to the said Port or any Places or Creeks appertaining to said Port such Ship, Boat, or Vessel then & there found to View

A comparison between the instant warrant of inspection (A. 52-53) and Paxton's Writ reveals a striking similarity. In neither document is specific information relating to any particular person or conveyance set forth, nor is the discretion of the officer in singling out the persons or objects to be inspected limited in any meaningful fashion. However, Paxton's Writ, which this Court characterized as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law,

& Search & strictly to examine in the same, touching the Customs & Subsidies to us due, And also in the day Time together with a Constable or other public officer inhabitating near unto the Place to enter and go into any Vaults, Cellars, Warehouses, Ships, or other places to search and see whether any Goods, Wares, or Merchandises in ye same Ships, Boats, or Vessels, Vaults, Cellars, Warehouses, Shops, or other Places are or shall be there held or concealed, having been imported, ship't or laden in order to be exported from or out of the said Port or any Creeks or Places appertain'g to the same Port; and to open any Trunks, Chests, Boxes, Fardells or Packs made up or in bulk, whatever in wh any goods, Wares, or Merchandises are suspected to be packed or concealed and further to do all Things which of Rt and according to Law and the Statutes in such cases provided, is in this Part to be done: and we strictly command you and every of you that you, from Time to Time be aiding and assisting to the said C.P., his Deputies and Servants and every of them in the execution of the Premises in all Things as becometh: Fail not at your Peril: WITNESS: Stephen Sewall, Esquire et cetra - *Gray*, 404-405.

that ever was found in an English law book",[34] contained more protection for the general citizenry than does the warrant now before the Court.

While Paxton's Writ was directed exclusively toward the discovery of undutied goods the Port of Boston, the warrant of inspection seeks to discover all violations of Title 8 of the United States Code (A-52). Further, Paxton's Writ directly affected only persons engaged in commerce in the Port of Boston while the instant warrant affects all motor traffic proceeding north on the Interstate 5 between San Diego and Los Angeles. Paxton's Writ limited the authority of the officer invoking its powers to the area immediately surrounding the Port of Boston, while the warrant of inspection authorizes millions of vehicle stops and interrogations each year sixty-six miles north of the border. The Writ also limited inspections of vaults, cellars, warehouses, shops, and other places on land to daylight hours while the warrant of inspection contains no similar limitations. In fact, the warrant here was a perpetual one renewed almost every ten days from 22 June 1974 through 5 March 1975. *See Martinez-Fuerte, supra*, at 312.

[34] *Boyd v. United States*, 116 U.S. 616, 625 (1886). Judge Oakes noted in *United States v. Barbera*, 514 F.2d 294, 301 (2d Cir. 1975) that: "one can suggest that in drafting the Fourth Amendment it was precisely such indiscriminate searches with which the Forefathers were primarily concerned, remembering that it was general warrants and writs of assistance which infuriated the Otises and Adams' [Citations omitted]. If general search warrants based on less than probable cause are to become the basis for official searches in such a side area, it would not be too bold to suggest that we have come a little way from *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1063 (1765) (overturning a 'ridiculous warrant against the whole English nation')."

The court below traced the history of the warrant clause of the Fourth Amendment to demonstrate the illegality of the present warrant and we adopt it in this brief.[35] *Martinez-Fuerte, supra,* at 314-322. It is anomalous that on the eve of this nation's 200th year as a free, independent people, the government seeks to return to such a controversial British practice that was a major cause of the American Revolution. The government has come full circle and now seeks approval of an odious device. Although the eloquence and logic of James Otis' presentation was unable to prevent the British appointed judges issuance of the writ of assistance, the respondents have the advantage of the unmistakably clear language of the Fourth Amendment to denounce this warrant of inspection. If the Fourth Amendment, by its terms or the circumstances of its creation, has any meaning, such a warrant of inspection is invalid.

[35] In our brief below, we included a lengthy appendix on the historical evolution of the Fourth Amendment, which is also available to this Court. Much of the history is stated in the opinion of the court of appeals and in ***Boyd v. United States,*** *supra,* at 624-625. Also, we have attached to this brief as Appendix B a schematic comparison of the instant warrant to Paxton's Writ used by respondents at oral argument on 7 November 1974 before the court below.

A. THIS GENERAL WARRANT OF INSPECTION CONTRAVENES TRADITIONAL FOURTH AMENDMENT REQUIREMENTS OF PROBABLE CAUSE, SPECIFICITY OF PERSONS AND THINGS TO BE SEIZED, AND REASONABLENESS.

The warrant in this case allows "routine inquiries to determine the nationality and/or immigration status of the occupants" of vehicles traveling north on Interstate 5 five miles south of San Clemente, California (A. 52-53). What a "routine inquiry" constitutes is not defined. No limitation is made upon the vehicles to be stopped at the checkpoint. The warrant permits the "routine inspection" of vehicles for the presence of aliens (*id*). If "routine" means the continuation of past Border Patrol procedure at the checkpoint, again it is the agent in the field and not a neutral and detached magistrate who is determining what vehicles to inspect, refer off the highway and what individuals to subject to "routine inquiries."

This unbridled standardless delegation of authority to Border Patrolmen at the San Clemente checkpoint leaves to the patrolman in the field all of the decisions that should be made by the magistrate. The warrant issued in this case tears at the very heart of the Fourth Amendment directive requiring the magistrate to protect against baseless seizures through the warrant mechanism. Justice Powell spoke to this issue in *United States v. United States District Court,* 407 U.S. 297, 317 (1972):

> "But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment,

> which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.
>
> * * *
>
> [T]his judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."

Simply stated, "The magistrate ought to judge; and should give certain directions to the officer." *Id.* Delegating total authority to law enforcement agents at the checkpoint to stop and inspect any vehicle, and interrogate occupants at their whim, constitutes an abandonment of the judicial function to law enforcement officers.

Since magistrates or judges can authorize only that which is lawful in the context of checkpoint stops and detentions, they can be presented with no more information on which to base a reasoned judgment than that exercised by the Border Patrolmen in the field. The information in the warrant and affidavits do not amount to legal cause justifying the stop of respondents' vehicles. If the patrolmen had sufficient cause to stop, this Court requires no warrant. *Brignoni-Ponce, supra.*

The use of the warrant is thus out of place. A warrant requires probable cause[36] and that term cannot be simply equated with government need. As this Court stated in a purely administrative context (home visits by welfare workers to insure compliance with regulations):

> The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that *it would have to rest upon probable cause, and probable cause* in the welfare context, as Mrs. James concedes, *requires more than the mere need of the caseworker* to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place. *Wyman v. James,* 400 U.S. 309, 324 (1971) (Emphasis supplied).

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[36]Since probable cause pertains to the occurrence of a crime and the secreting of evidence in a specific place, the general warrant involved in this case should be examined to determine *what crime is involved.* There must be a nexus between the things to be seized and criminality. *Warden v. Hayden,* 387 U.S. 294, 307 (1967). The warrant under consideration states that "mass violations of the immigration laws of the United States (Title 8, United States Code) have been and are being committed . . ." (A. 52). Title 8 is a rather large section of the United States Code containing numerous statutes relating to criminal law violations. In allowing the Border Patrol to stop vehicles, make inquiry of the driver and occupants, inspect what is in plain view in the vehicle, and demand documents, the warrant fails to state any specific crime for which evidence may be found in the vehicles. For comparison purposes, consider the scope of a warrant for violations of Titles 18 or 26.

In arguing *Almeida-Sanchez*, the government agreed that such a warrant as considered here would add no protection or significant restrictions on the checkpoint conduct of the Border Patrol:

> The historic aversion to general warrants, as embodied in the Fourth Amendment, and the Court's decision in *Camara* that a magistrate should not review the basic agency decision to canvass an area, indicate that a 'warrant' approving the overall inspection program would not be a proper or useful judicial action. Hence, the interposition of a magistrate, even if it were feasible, could not add any significant protection in an otherwise reasonable inspection program. Brief for United States, 37-38 (1973). We agree.

B. THE ANALOGY TO ADMINISTRATIVE INSPECTION CASES DECIDED BY THIS COURT IS INAPPOSITE.

Relying upon Justice Powell's concurrence in *Almeida-Sanchez*, 413 U.S. 275-285, petitioner seeks to justify the broad sweep and lack of specificity in the warrant of inspection by analogy to the administrative inspection case of *Camara v. Municipal Court*, 387 U.S. 523 (1967). In *Camara*, this Court established three criteria for determining whether an administrative inspection might be conducted upon a showing of less than probable cause. Respondents submit that the applicable standard for judging the legality of the seizures conducted in this case is reasonable suspicion rather than probable cause, *Brignoni-Ponce, supra*. Yet, it is nevertheless instructive to determine whether the administrative inspection analogy is sufficiently compelling to justify a total emasculation of the reasonable

suspicion standard announced in *Brignoni-Ponce*, as petitioner urges.

In *Camara*, this Court held that administrative inspections designed to enforce building code regulations could be made with warrants issued on less than probable cause to believe that particular dwellings were the cites of particular violations. The factors that were cited in support of this conclusion were: (1) a long history[37] of judicial and public acceptance of the type of search, (2) the need to conduct the search in light of the *lack of alternatives* available, and (3) the *limited intrusiveness* of the search upon the individual's privacy by virtue of its nonpersonal nature and its administrative, as opposed to criminal, focus. *Id.* at 537.

The checkpoint stops and "routine inspections" contemplated by the warrant in this case fail to meet

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[37] See "Area Search Warrants in Border Zones: *Almeida-Sanchez* and *Camara*," 84 *Yale L.J.* 55, 61-362 (1974), where the author argues that the first time this Court was confronted with the question of the validity of a causeless immigration search, it was invalidated. By contrast, the practice involved in *Camara* had not only been accepted for more than 150 years, it also had been previously upheld by the Court in *Frank v. Maryland*, 359 U.S. 360 (1959). It was not until 1946 that Congress first enacted the precursor of 8 U.S.C. § 1357 which ostensibly gave immigration agents stop and search powers away from the border. *United States v. Bowen*, 500 F.2d 960, 983 (9th Cir. *en banc* 1974) (Hufstedler concurring and dissenting) reversed on other grounds 422 U.S. (1975). For other criticism of the area warrant concept, see *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975); Santana, "*Almeida-Sanchez* and its "Progeny: The Developing Border Zone Search Law," 17 Ariz.L.Rev. (1975); Note, "The Aftermath of *Almeida-Sanchez v. United States:* Automobile Searches For Aliens Take on a New Look," 10 *Cal.West.L.Rev.* 657 (1974).

all of the criteria suggested in *Camara*. The non-existence of an extensive history of judicial acceptance of immigration inspections well away from the border at inland checkpoints is obvious. The government is surely in no position to argue that there are no other effective means of stemming the tide of illegal immigrants.

The court below noted that intensification of the borderline watch is just one of many alternatives available to the government:

> The major forces that bring aliens to this country from Mexico are economic. Here they can get jobs, and jobs at higher wages than they can earn at home. At the same time, and because they are in this country illegally, they cannot complain about the working conditions or wages on the jobs that they obtain in this country. This produces an almost irresistible economic incentive to American employers to employ them. They are cheap and docile labor. We know that in many cases the terms and conditions under which they are employed are deplorable. In this respect, they compete, and compete unfairly, with American labor.[38] Congress could if it would, neutralize these forces by imposing sanctions on employers who hire an "illegal alien", [footnote omitted].

There are other actions that might be taken. The I-151, or "green card" program, and the I-186

[38]In June 1975, the International Labour Organization adopted Convention 143 and Recommendation 151 attempting to remedy the inadequacies or nonexistence of international provisions, including those found in former ILO Conventions, on many of the problems of migrant workers . . . The recent NGO Conference on Discrimination against Migrant Workers in Europe concluded that ratification and enforcement of this Convention would go a long way to remedying the most patent abuses which now exist with respect to migrant workers . . . .

Part I of the Convention contains a programme which, if carried into effect, would effectively eliminate the existence of a massive illegal work force of migrants. The application of

> "administrative, civil and penal sanctions, which include imprisonment in their range", would be required against those who organize the illegal entry of migrant workers or who employ illegal migrants (Art. 6). Employers must have the right to furnish proof of good faith in order to escape these sanctions. The ratifying States agree to undertake between themselves action including the prosecution of those who traffic in manpower notwithstanding the country from which they exercise their activity (Art. 6).

Russo, "Migrant Workers: Existing and Proposed International Action on Their Rights," 15 *The Review of the Int'l Comm. of Jurists* 51, 55-56 (Dec. 19, 1975).

temporary border pass card program could be eliminated. Congress could require that every alien entering from Mexico have a valid passport and entry visa. This might interrupt or reduce the extensive shopping the card holders now do in American border cities, but it is an alternative open to Congress if it finds the "illegal alien" problem as serious as government counsel tells us that it is.

> So, too, the Congress could abolish the alien "commuter system", which is an obvious subterfuge, that was before the Court in *Saxbe v. Bustos* [citations omitted]. We do not purport to have explored other possibilities. We mention the foregoing only because the government is here claiming "necessity" as a reason for abandoning constitutional protections. We are not persuaded by the government's argument that operation of the San Clemente checkpoint, and others like it, is the only way to deter the entry of "illegal aliens" from Mexico. *Martinez-Fuerte, supra,* at 319. See also Section IB, *supra.*

Similarly, the government conduct in operating the checkpoint in this case fails to meet the third criteria for the *Camara*-type administrative inspection in that the incidence of criminal prosecution resulting from the detection of an immigration violation is certainly substantial regardless of the government's declarations that its primary purpose in operating the checkpoints is to expel illegal immigrants. As the *Baca* hearings disclosed, while most of the illegal aliens detected at the checkpoints are simply deported, the government does prosecute virtually *all* persons suspected of smuggling these illegal entrants (B. Tr. 462-465). United States Magistrate Harry McCue testified in *Baca* to the existence of the optional felony-misdemeanor prosecutions in the Southern District of California for those charged with immigration offenses (B.Tr. 456-458).

A typical complaint is worded in two counts, one charging a violation of felony transportation of illegal aliens under 8 U.S.C. § 1324(a)(2) while the second count is a misdemeanor charging a violation of aiding and abetting the illegal entry of aliens under 18 U.S.C. § 2 and 8 U.S.C. § 1325 (B. Tr. 457). The purpose of

this type of complaint is to give the accused an opportunity to plead to a misdemeanor as soon as possible. Since all of the aliens located in a vehicle driven by an accused smuggler must be incarcerated to provide the defendant an opportunity to examine them for possible exculpatory evidence, this unique complaint procedure allows am accused to plead guilty to a misdemeanor and for the prompt release of the alien witnesses to Mexico. See *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971) (B. Tr. 457). Magistrate McCue testified that all such cases could be prosecuted on a felony basis alone if the government so elected:

> I don't think there is any question about that. That all the defendants who are charged criminally, under the immigration laws, could have been charged with felony violations of the immigration laws. . . . (B. Tr. 458).

He also testified that the reason rather substantial jail terms are handed out to defendants in magistrate court is that the latter court is faced with processing felony alien smuggling cases on a misdemeanor level (B. Tr. 458).

When aliens are found in a vehicle at a checkpoint, the individuals in the vehicle are treated by the government as either criminal defendants or material witnesses (B. Tr. 464). The election whether to charge the individual as an illegal entrant, a smuggler, or a material witness detained for possible court testimony is that of the government (B. Tr. 464).

Magistrate McCue testified that two of the three full-time magistrates in the Southern District of California (excluding from consideration two part-time magistrates) handled in 1971 and 1972 about 7,000

immigration cases each year (B. Tr. 464). Virtually none of these prosecutions involved illegal entrant passengers of vehicles who were merely being transported or attempting to enter on foot (B. Tr. 464-465). Of the 7,000 prosecuted per year, approximately 40% were permanent resident aliens or citizens of the United States (B. Tr. 467). Of this group of individuals having a legal right to be here, the vast majority of the prosecutions for violations of immigration laws of necessity involved smuggling violations. Because the government usually does not choose to prosecute the simple illegal alien entrant, only those illegal aliens with an aggravated history of repeated entry or those who elect to drive other illegal aliens are prosecuted.

In sum, the prosecution pattern in the Southern District of California reveals thousands of prosecutions for smuggling violations. This prosecution scheme involves not only the arrest of the driver of a vehicle, but also the detention of the illegal aliens, who are incarcerated in the United States to insure the defendant and the government a fair trial (B. Tr. 470). The illegal alien entrant apprehended at a checkpoint is not invariably administratively processed and deported to Mexico. With the arrest of a smuggler for prosecution, all of the aliens must be held in custody as witnesses.

Moreover, the *Baca* record clearly demonstrated that Border Patrol officers of the Immigration and Naturalization Service are uniformed, armed law enforcement officers and not administrative officials (B. Tr. 255-156). Also, the hearings established that the INS frequently invites representatives from the Drug Enforcement Agency and Customs to join them at their checkpoints (B. Tr. 84-85).

In light of this substantial evidence of at least a dual administrative-criminal function of the checkpoint, it is clear that the checkpoint inspections do not meet the third prong of the *Camara test.*[39] The court below agrees:

> That the border patrol checkpoint operations are both personal in nature and aimed at the discovery of evidence of a crime is beyond dispute. Inherent in the government's argument here, and in its argument in *Almeida* (413 U.S. at 278, 93 S.Ct. 2535 (Powell, J., concurring)), is the fallacy that its practice of simply deporting aliens rather than prosecuting them gives its operations a quasi-administrative aspect. Although most aliens are simply deported, it is nonetheless true that the government does seek to prosecute virtually all smugglers of illegal aliens. *Baca*, R.T. 462-65. See *Baca, supra*, 368 F. Supp. at 406 ("particular attention" paid to smuggling operations). Furthermore, border patrol agents are armed with service revolvers. *Baca* R.T. 255, 289. They are law enforcement officers and cannot rationally be viewed as administrative personnel. *Id.* at 256. The very facts of the three appeals now before us attest to their criminal law enforcement duties and activities. The checkpoints perform primarily crime-investigative rather than administrative functions. *Martinez-Fuerte, supra*, at 320.

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[39]One commentator has suggested that a rule excluding the fruits of an administrative search from use in a criminal proceeding would give "substantial content to the non-prosecution criterion of *Camara* while allowing the government to achieve its stated purpose of excluding illegally entering aliens". Tribe, "*The Supreme Court, 1972 Term,*" 87 *Harvard L.R.* 1, 204 (1973).

C. EVEN ASSUMING THE ADMINISTRATIVE ANALYSIS IS APPROPRIATE TO STOPPING AND INTERROGATING PEOPLE NEAR THE BORDER AREA, THE SAN CLEMENTE CHECKPOINT CANNOT BE GOVERNED BY THIS RULE.

Respondents submit that even if Mr. Justice Powell's analogy to the field of administrative inspections is appropriate, the warrant issued in this case to justify the operation of the San Clemente checkpoint does not satisfy any of the requirements Justice Powell enumerated for the issuance of an area warrant.

In concluding that the *Camara*-type analysis was appropriate to the situation faced by the INS in the border areas, Justice Powell listed a number of relevant factors which should be considered in determining whether a warrant might issue for a specified area.[40] These factors were: "(i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." *Almeida-Sanchez v. United States, supra,* at 283-284.

[40] As mentioned earlier, these four factors were not considered by the district court in the *Baca* hearing since that court did not reach the issue of the functional equivalence of probable cause. *Baca, supra,* at 415, n.3.

In analyzing the first factor enumerated by Justice Powell, the court below noted that the government's own statistics garnered from the return on the warrant of inspection negated its contention that the percentage of aliens utilizing the route on which the checkpoint is located was sufficiently high to qualify under this aspect of Mr. Justice Powell's analysis. The court found that "[d]uring the effective period of the warrant of inspection only 0.12% of the passing cars were found to contain 'illegal aliens'. Other considerations aside, that miniscule fraction alone would render the checkpoint operation unreasonable." *Martinez-Fuerte, supra,* at 321.

The government contends in its brief, however, that the Court of Appeal's analysis was faulty because the figure it arrived at was obtained by dividing the number of vehicles in which aliens were found by the total number that passed the checkpoint during its hours of operation. The figure is inaccurate, according to the government, because of the fact that only 820 of the 145,960 vehicles passing through the checkpoint were stopped *for questioning* (Brief for Pet. 53-54). However, petitioner's analysis fails to take into account the affect upon average motorists of armed Border Patrolmen standing on either side of a sign which clearly tells them to stop. The government counts as a "stop" of a vehicle a referral to the secondary inspection area at the checkpoint where a more detailed examination of the vehicle's occupants is conducted and questioning takes place. The primary "fleeting stop"[41] in the middle of the highway is completely ignored.

[41] In reading the government's definition of the word "stop," one is reminded of the teaching of Lewis G. Carroll's Humpty Dumpty, where he recites: "When *I* use a word, . . . it means just what I choose it to mean—neither more nor less." *The Annotated Alice, Through the Looking Glass,* 269 (Forum Books 1969).

No matter how one describes the checkpoint stop operation, the fact remains that only about one-tenth of 1% of the vehicles which are screened by this operation are found to contain illegal entrants. Even a utilization of the government's distorted analysis discloses that four out of five of the vehicles which are referred to the secondary inspection area for a more intensive inspection were found to contain no immigration law violators (Brief for Pet. 54). *Martinez-Fuerte, supra,* at 314.

The government asserts, nevertheless, that the statistics are not determininative "because there is no assurance that every vehicle containing illegal entrants was successfully stopped by the officers at the checkpoint" (Brief for Pet. 54). Even if this assertion were true, the government cannot be permitted to demonstrate satisfaction of the requirements of one of Justice Powell's prerequisites by reference to nothing more than sheer speculation. Mr. Justice Powell referred to the frequency with which aliens are "known or reasonably believed" to be transported, not the frequency with which government officials subjectively suspect that are transported within a particular area.

The second and third requirements for the issuance of a valid area warrant enunciated by Justice Powell – the proximity of the area in question to the border and the extensiveness and geographic characteristics of the area including the roads therein and the extent of their use – overlap to a considerable extent. Initially, however, it should be noted that the particular checkpoint which is the subject of this warrant is located 66 miles from the international border with Mexico. The Court of Appeals in noting this fact determined that in listing proximity as a relevant factor, Justice Powell must have envisioned inspections which

physically took place much closer to the border. *Martinez-Fuerte, supra,* at 321. This conclusion is bolstered by reference to the testimony given by Mr. Charles Gordon, former General Counsel for the Immigration and Naturalization Service, before the House Subcommittee on Immigration, Citizenship, and International Law on July 26, 1973. Mr. Gordon related that he believed "the majority of the court has endorsed [the] concept of an area search warrant in an area where there is strong suspicion that aliens are being smuggled in, like a back road near the border."[42]

Justice Powell's opinion itself supports the correctness of this analysis. His explanation of the related factor of the geographical characteristics of the area in question contains examples of the type of area which he anticipated would be the proper subject of an area warrant:

> Depending upon the circumstances, there may be probable cause for the search to be authorized only for a designated portion of a particular road or such cause may exist for a designated area which may contain one or more roads or tracks. Particularly along much of the Mexican border, there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities – by virtue of their isolated character – for the smuggling of aliens. 413 U.S. at 284, n. 4.

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[42] *Hearings before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives,* 93d Cong., 1st Sess., 22 (1973).

The Court of Appeals correctly concluded, based upon this statement, that geographic characteristics are relevant only to establish an essential nexus with the border which nexus is patently lacking in the case of the San Clemente checkpoint. *Martinez-Fuerte, supra,* at 322.

The petitioner, however, completely ignores this statement of intent contained in Justice Powell's opinion and asserts that the San Clemente checkpoint fits the mold envisioned in the concurring opinion in *Almeida-Sanchez* because "geographic considerations and the fraudulent use of border crossing identification cards make it necessary to place most checkpoints, including the San Clemente checkpoint, at least 25 miles from the border [citations omitted]" (Brief for Pet. 55). As has been previously mentioned, the government states elsewhere in its brief that aliens who enter lawfully with valid border crossing documents and later violate the terms of their entry constitute an insignificant proportion of the total number of illegal entrants (less than four percent) (Brief for Pet. 28). In the face of this statement, the government can only prevail on this aspect of the analysis if it can demonstrate that the checkpoint is as close to the border as possible given the topography of the area. Petitioner does not attempt to make such a showing but rather reverts to the argument that it would be too inconvenient and expensive to check traffic on the roads closer to the border area. (Brief for Pet. 56-57). These considerations, demonstrated spurious, *supra,* are not sufficient justification for dispensing with the rights of the general populace to "free passage without interruption or search. . . ." *Carroll v. United States,* 267 U.S. 132, 154 (1925). Moreover, evidence introduced in the *Baca* hearings belies the petitioner's

contention that placing the checkpoint nearer to the border would pose insurmountable traffic problems. Defense Exhibit C, introduced by the defense in *Baca,* indicates that the traffic flow north in the area closest to the border is low, but as the roads proceed north, the volume of traffic greatly increases.[43] *Cf., Baca, supra,* at 411. Moreover, while the checkpoint is not open on a 24-hour a day, seven days a week basis, it is nevertheless true that the overwhelming majority of the vehicles subjected to the traffic inspection program at the checkpoint contain completely innocent members of the traveling public who have not ventured near the border.

Many of the aforementioned considerations apply with equal force to a proper resolution the fourth factor in Justice Powell's formulation, the probable degree of interference with the rights of innocent persons. It bears repeating, however, that while the figures relied upon by the court of appeals in determining the percentage of the traffic passing the checkpoint attributable to immigration violators may not accurately reflect their total proportion because of the ineffectiveness of the apprehension effort, it is not disputed that these violators constitute a very small proportion of those subjected to violations of their constitutional rights. Indeed, the ineffectiveness of this apprehension technique strongly and persuasively in-

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[43] Attached as Appendix C to this brief is a graphic demonstration of the Exhibit showing that more volume of traffic passes San Clemente than crosses the border 66 miles to the south. Of course, there is no reason to believe that the border traffic, or any part thereof, proceeds on to San Clemente. (*Cf.,* Brief for Pet. 50).

dicates that this Court should not strain the bounds of the Fourth Amendment in order to accommodate the San Clemente checkpoint.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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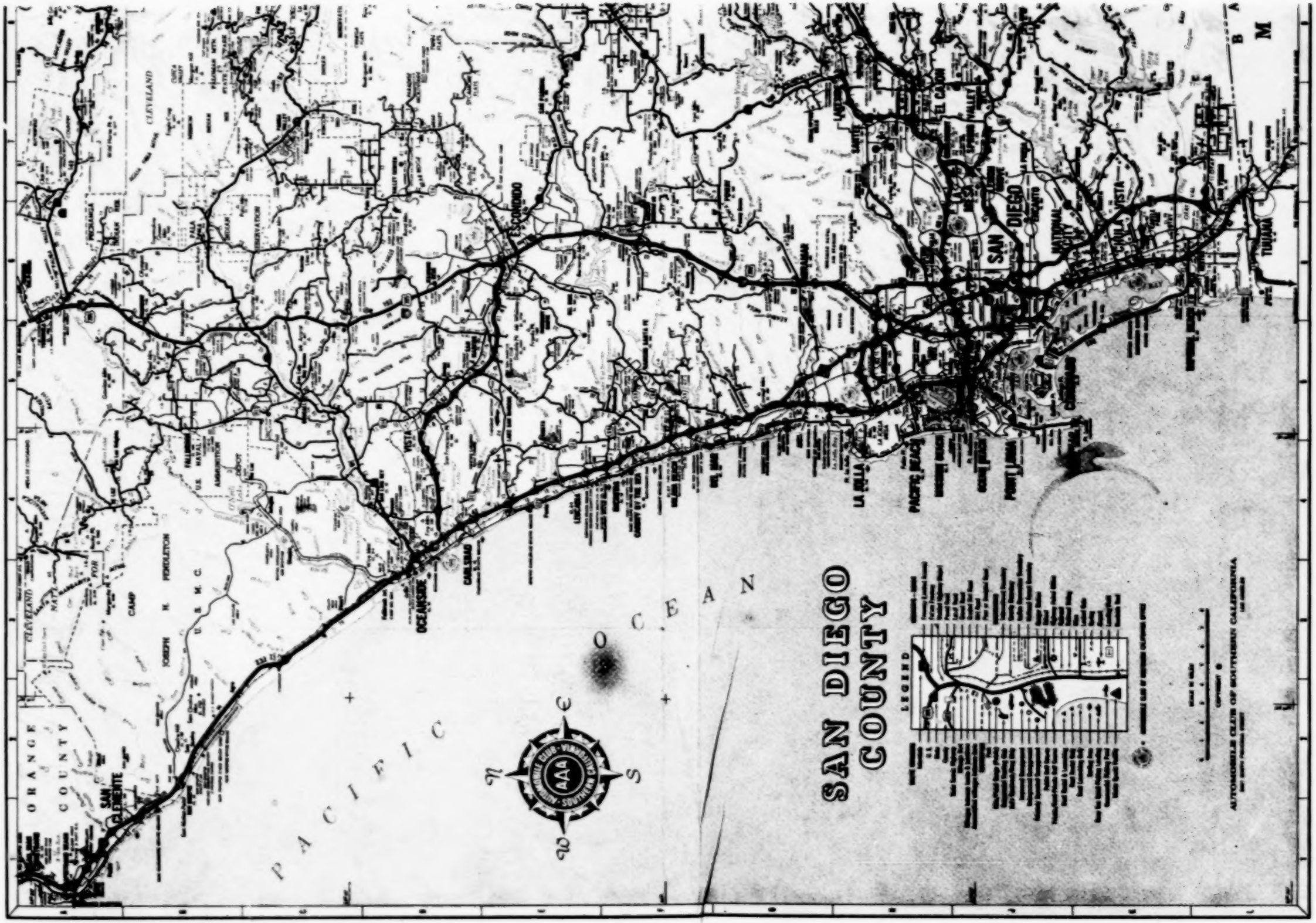
DATED: 5 January 1976

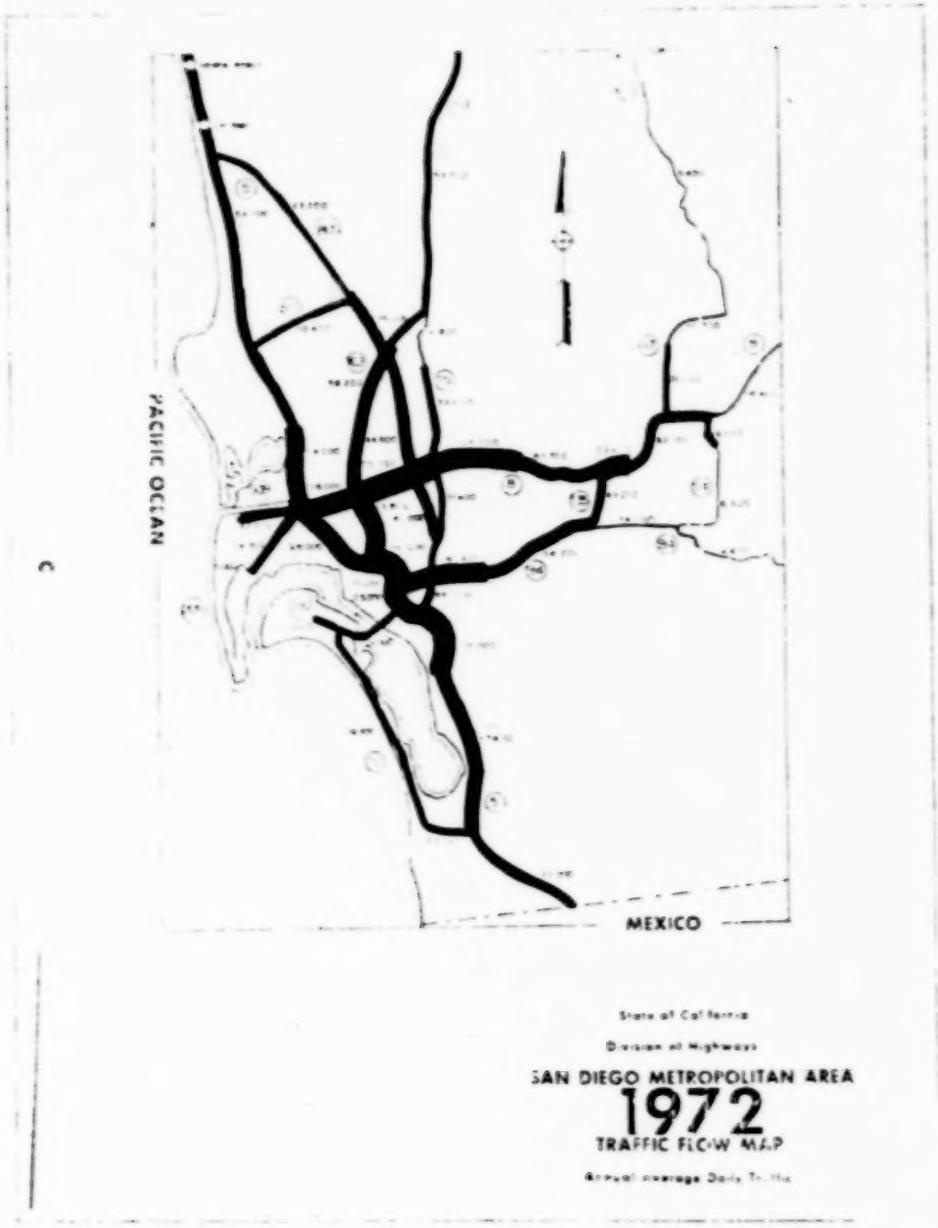
APPENDIX A


SAN DIEGO COUNTY
PACIFIC OCEAN
ORANGE COUNTY
CLEVELAND
CAMP JOSEPH H. PENDLETON
U.S.M.C.
FALLBROOK NAVAL WEAPONS STATION
CORONADO
OCEANSIDE
CARLSBAD
SAN CLEMENTE
SAN DIEGO
LA MESA
PACIFIC BEACH
MISSION BAY
MISSION VALLEY
POINT LOMA
NATIONAL CITY
CHULA VISTA
IMPERIAL BEACH
TIJUANA
MEXICO
LEGEND
AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA

APPENDIX B

	1761 PAXTON'S WRIT	1974 WARRANT
PURPOSE:	DISCOVERY OF UNDUTIED GOODS ENTERING PORT OF BOSTON	DISCOVERY OF VIOLATIONS OF TITLE 8 USC 1 - 1357
PERSONS AFFECTED:	PERSONS ENGAGED IN COMMERCE IN PORT OF BOSTON	ALL MOTOR TRAFFIC PROCEEDING NORTH ON INTERSTATE 5 (10,000,000 CARS PER YEAR)
ACTION AUTHORIZED:	TO SEARCH VESSELS, BUILDINGS CONTAINERS FOR GOODS IN PORT AREA	TO STOP, INQUIRE, AND MAKE ROUTINE INSPECTIONS OF ALL CARS TRAVELING NORTH ON INTERSTATE 5
LIMITATIONS:	SEARCHES OF TRUNKS, ETC., MUST BE BASED UPON SUSPICION GOODS EXIST THEREIN	NONE (EXCEPT INSPECTIONS MUST BE "ROUTINE")
AREA:	BORDER (PORT OF BOSTON)	68 MILES NORTH OF BORDER NEAR SAN CLEMENTE, CALIFORNIA
TIME:	DAYTIME ONLY SEARCHES ON LAND OR BUILDING; DAY OR NIGHT FOR VESSEL SEARCHES	OPERATIONS AUTHORIZED CONTINUOUSLY SINCE 22 JUNE 1974 DAY OR NIGHT
FOCUS:	UNDUTIED MERCHANDISE	A CLASS OF HUMAN BEINGS

APPENDIX C



APPENDIX C-1